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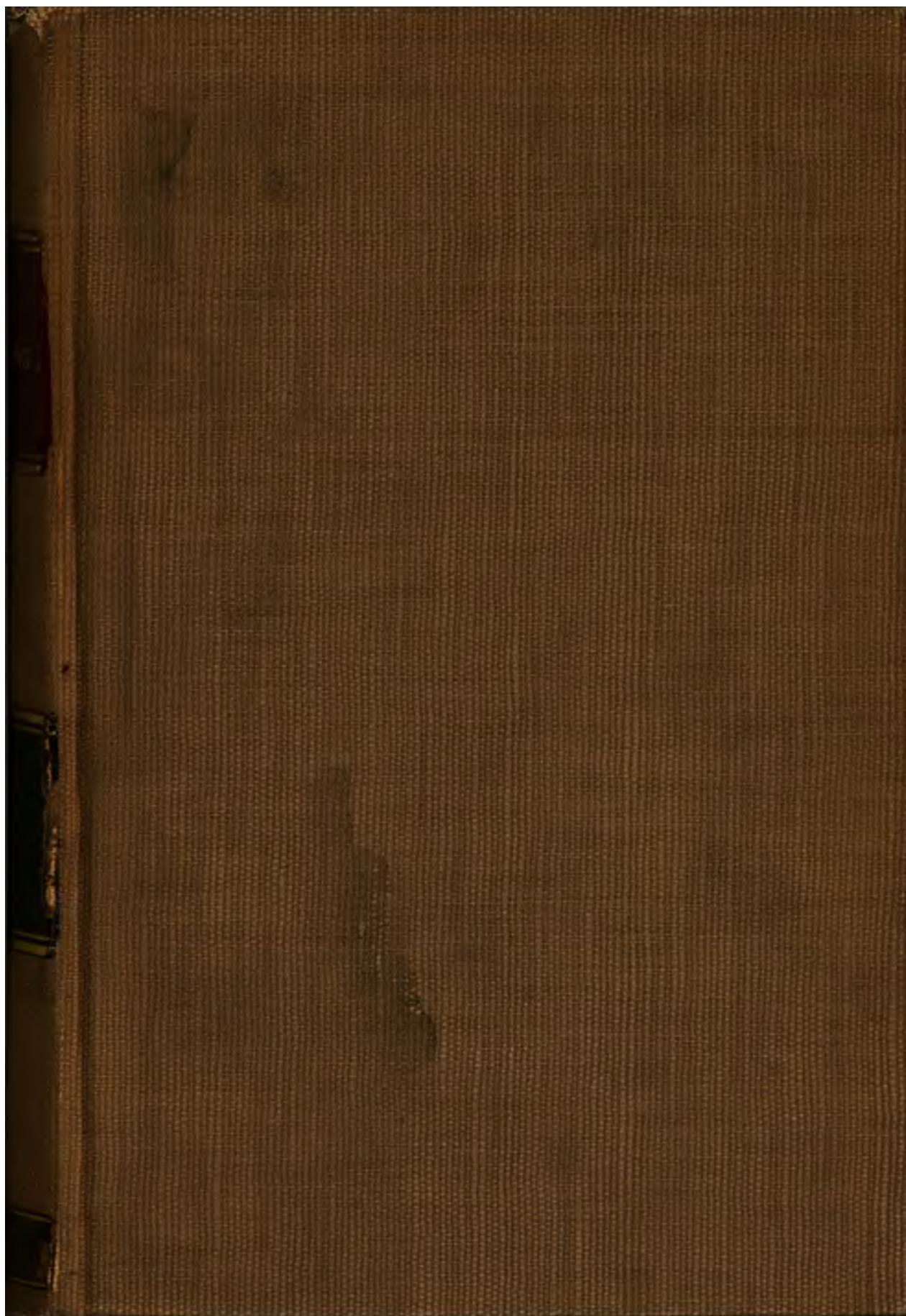
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1. The first part of the paper discusses the importance of the study of the history of the United States. It is argued that the study of history is essential for a full understanding of the present and for the development of a sense of national identity.

2. The second part of the paper discusses the role of the federal government in the development of the United States. It is argued that the federal government has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

3. The third part of the paper discusses the role of the states in the development of the United States. It is argued that the states have played a central role in the development of the country, and that their actions have been crucial to the success of the nation.

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7. The seventh part of the paper discusses the role of the economy in the development of the United States. It is argued that the economy has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

8. The eighth part of the paper discusses the role of the culture in the development of the United States. It is argued that the culture has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

9. The ninth part of the paper discusses the role of the environment in the development of the United States. It is argued that the environment has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

10. The tenth part of the paper discusses the role of the future in the development of the United States. It is argued that the future has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

11. The eleventh part of the paper discusses the role of the past in the development of the United States. It is argued that the past has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

12. The twelfth part of the paper discusses the role of the present in the development of the United States. It is argued that the present has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

13. The thirteenth part of the paper discusses the role of the future in the development of the United States. It is argued that the future has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

14. The fourteenth part of the paper discusses the role of the past in the development of the United States. It is argued that the past has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.

15. The fifteenth part of the paper discusses the role of the present in the development of the United States. It is argued that the present has played a central role in the development of the country, and that its actions have been crucial to the success of the nation.





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THE LAW  
OF  
MINES  
AND  
MINING INJURIES

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BY EDWARD J. WHITE, LL.B.

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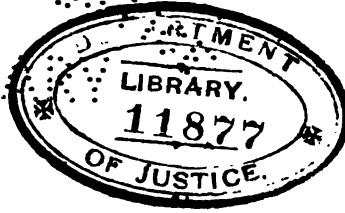
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TO MY NEPHEW,  
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OF

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## PREFACE.

It was the original intention of the author to treat the subject of the following pages under a different arrangement than that adopted, *i. e.*, to devote the first part of the work to "Mines Upon Private Lands," and the second part to "Mines Upon Public Lands."

This is the natural and logical subdivision of the subject, under the existing laws applicable to mining in the United States; but the recent thorough works of Lindley, Barringer and Adams, and the 10th edition of Morrison's Mining Rights, covered practically the same field that was intended to have been cultivated in the second part of this work, so the whole arrangement of the book was altered. The material intended to form a second part of the book was condensed into one chapter, and because of the comprehensive treatment of the subject of Mining upon the Public Domain, in the works named, the present divisions of the subject—not heretofore extensively considered in any work that has come to the author's attention—were adopted.

The first part of the book treats of the different "Relations Arising from the Ownership of Mines and Minerals"—and under this head are grouped all the relations arising from mining upon both public and private lands—while the second part presents the most generally used remedies for "Injuries to Mining Rights and Persons."

It was the author's desire to present the law of mines in a condensed, yet general and systematic form, useful to lawyers.

In collecting the data for this book, "Morrison's Mining



Reports," "MacSwinney on Mines," "Wade," "Bainbridge," "Collyer," "Barringer and Adams," "Lindley," and "Blanchard and Weeks Leading Cases," have all been found of great value. "Snyder on Mines" did not appear until the manuscript for this work was in the hands of the publishers.

E. J. W.

AURORA, MISSOURI,  
June, 1903.

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## **PART I.**

**RELATIONS ARISING FROM THE OWNERSHIP  
OF MINES AND MINERALS.**



# MINES AND MINING

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## PART I.

### RELATIONS ARISING FROM OWNERSHIP IN MINES AND MINERALS.

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## CHAPTER I.

### MINES AND MINERALS GENERALLY.

#### SECTION 1. What is a mine.

2. The pit or excavation.
3. Same — Mine distinguished from quarry.
4. Nature and definition of minerals.
5. Same — "Veins" — "Seams" and "Lodes."
6. "Placer" and "Lode" mines distinguished.
7. Soil and subsoil not mineral.

§ 1. What is a mine? — In legal contemplation, a mine, such as will be treated of herein, is a pit, or excavation in the earth, from which mineral is taken.<sup>1</sup> The term is perhaps derived from the Latin word, "*minare*," of the ancient ages, signifying "a subterraneous passage, whether in search of

<sup>1</sup> Wharton's Law Lexicon; Webster's Dict.; Johnson's Dict.; Worcester's Dict.; MacSwiney on Mines, — a scientific English text-book of great value — pp. 1 and 3; Blan. & Wk. Ld. Cas., p. 13; Pierce v. Tidwell, 81 Ala. 299; Ah Yew v. Choate, 24 Cal. 562; Springside Coal Co. v. Grogan, 53 Ill. App. 60; Midland R. Co. v. Haunchwood, 20 Ch. D., 555. This definition may be inaccurate, but is deemed in accordance with the popular meaning placed on the term by English and American interpretations. "Earth" is here used in the sense of *soil*, not as a planet.



metals or to destroy fortifications,"<sup>1</sup> and in its primary meaning no doubt referred to all underground excavations of the character named. Gradually,<sup>2</sup> by transitions, it was used, more particularly, to designate excavations made to obtain ores and minerals<sup>3</sup> (and is still used by some authors, lexicographers and judicial tribunals in this sense),<sup>4</sup> but the

<sup>1</sup> Encyclopædia Metropolitana; MacSwinney on Mines, p. 8.

<sup>2</sup> "The primary meaning of the word, standing alone, is an underground excavation." Encyclopædia Britannica; Enc. Metropolitana; Mid. R. Co. v. Haunchwood & Co., 20 Ch. D. 555; MacSwinney, *supra*. Legal enactments of different countries have caused various significations. In France and Belgium the substance mined governs the name applied, while in England it is the character of the excavation. *Enc. Brit.* Hence, what might be a quarry in France is liable to be a mine in England, and *vice versa*. (This illustrates the impossibility of giving any positively correct definition, as well as other uncertainties, caused by the mutations of laws and the customs of people.) "A pit being dug, to be used when completed, as the shaft of a coal mine, to be opened, is not a *coal mine*, within the meaning of the statute." Springside Coal Mine Co. v. Grogan, 53 Ill. App. 60 (1892).

<sup>3</sup> Encyclopædia Metropolitana; *Enc. Brit.*; MacSwinney, *supra*; Bell v. Wilson, 10 Mor. Min. Rep. 415; Darvill v. Roper, *Idem*, 406.

<sup>4</sup> Bouvier defines a mine as a pit or excavation made *for the purpose of obtaining mineral*, but this definition is too broad, in leaving out of the question the existence of mineral, and too narrow in confining the term to pits made "for the purpose of obtaining mineral" only, for whatever the purpose, if ore is found and mined, the excavation would be held a mine. Should ore be discovered in a well, and subsequently mined, it would be none the less a mine, because the original purpose of the excavation was to obtain water instead of mineral. But many have adopted this definition. Bouv. Law Dict. 180; Ross v. Wainman, 14 M. W. 859; s. c. 2 Exch. 800; 15 L. J. Exch. 97; Tomlin's Law Dict.; Webster's Dict.; Rex v. Boettel, 3 Barn. & Ad. 424; Rex v. Alderbury, 1 East, 534. See Darvill v. Roper, 3 Drew. 294, where the meaning of the term was held to depend on the mode of obtaining the mineral. Micklethwait v. Winter, 5 Eng. Law & Eq. 526; 20 L. J. Ex. 313; Shaw v. Wallace, 1 Dutch. (N. J.) 453. The following late cases also seem to hold an excavation a mine, although mineral is not discovered: Morrow v. Flimby Coal Co. (1898), 2 Q. B. 599; McCurtin v. Grady, 1 Ind. Terr. 107; Westmoreland Coal Co.'s App., 85 Pa. St. 344. But the weight of authority is in accord with the definition in the text. See MacSwinney, *supra*, and cases cited; also 20 Am. and Eng. Enc. Law (2 Ed.) 682.

derivative history of the word shows that its use has been limited of later years, to apply, more exclusively; to the excavation made therefor and the place from which the mineral is taken.<sup>1</sup> The great weight of modern opinion limits the meaning of the word to excavations yielding mineral.<sup>2</sup> Hence, the definition a pit, or excavation, yielding mineral, both elements of which — *i. e.*, an excavation and mineral — are essential to constitute a mine.

§ 2. The pit or excavation. — Under the various definitions of a mine, the pit or excavation is a necessary element. The word "mine" includes not only the ore in place, but the space caused by its removal and the passageway to obtain it.<sup>3</sup> The excavation which, in conjunction with the

<sup>1</sup> "The word includes the stratum of mineral, as well as the excavation made to mine it." *Mid. R. Co. v. Haunchwood Co.*, 20 Ch. D. 555, per Kay, J.; *Spencer v. Scurr*, 10 M. M. R. 368; *Westmoreland's Co. App.*, 10 *Id.* 394; *Springside Coal Co. v. Grogan*, 58 Ill. App. 60; Wharton's Law Lex. and citations; MacSwinney on Mines, Chap. I. "Colliery," probably from "coalery," is but a particular kind of mine—a coal mine, or place where coal is dug.—Webster, Worcester, Johnson. It is not confined to any one vein or seam of coal but extends to all worked from the same "mine," or "colliery." MacSwinney, p. 25; *Hodgson v. Field*, 7 East, 620; *Carey v. Bright*, 58 Pa. St. 70.

<sup>2</sup> *Bainbridge on Mines*, 1, 8; MacSwinney, pp. 1 to 4; *Bell v. Wilson*, L. R. 1 Ch. App. 808; *Spencer v. Scurr*, 81 Beav. 334; *Darvill v. Roper*, 3 Drew. 294; *Cleveland v. Mayrick*, 37 L. J. Ch. 125; *Brown v. Chadwick*, 7 Ir. C. L. 101; *King v. Alberbury*, 11 East, 534; *Haddock v. Commonwealth*, 108 Pa. St. 243; *Forbes v. Gracey*, 94 U. S. 762; *Shaw v. Wallace*, 25 N. J. Law (Dutch.), 462; *Springside Coal Co. v. Grogan*, *supra*; *Pierce v. Tidwell*, 81 Ala. 299; *Westmorland's Co.'s App.*, 85 Pa. St. 344; 6 Amer. and Eng. Enc. of Law, 532; 15 *Idem*, 504. But in Illinois a mine prepared for work, although no ore had been removed, has been held a "mine," under the act governing inspection and safety of miners. *Coal Run Co. v. Jones*, 19 Ill. App. 365. The case of *Coal Run Co. v. Jones*, 127 Ill. 379, reverses 19 Ill. App. 365.

<sup>3</sup> *Brown v. Chadwick*, 7 Ir. C. L. Rep. 108; *Tucker v. Linger*, 21 Ch. D. 36; *Bainbr. on Mines*, 2-3; MacSwinney, p. 2. The right of property in the mine extends as well to the vacuum from which the ore is removed as to the ore in place. Wharton's Law Lex.; MacSwinney, *supra*.

mineral, will justify the name of mine, is generally begun from the surface of the soil only, by means of a perpendicular shaft or lateral drift, so that a roof is left overhead and the work prosecuted by means of a pit or tunnel.<sup>1</sup> The mine, however, includes the drift as well as the shaft or entrance to the same, for both are excavations made for the purpose of obtaining minerals.<sup>2</sup> In some classes of gold mines the excavations consist only in removing a portion of the surface,<sup>3</sup> while in lead, zinc and coal mines the mining is prosecuted principally by drifting for the mineral, with the excavation entirely beneath the surface.<sup>4</sup> Hence, in determining whether a given excavation is a mine or not, regard must be had not only to the nature of the excavation or mode of working, but also to the chemical or geological character of the formation.<sup>5</sup> Neither the excavation without the mineral, or the mineral in place without the excavation, could be properly termed a mine.<sup>6</sup> However, the term mine applies as well to excavations from which metallic ores are taken, as those from which other mineral substances are obtained;<sup>7</sup> but pits from

<sup>1</sup> *Darvill v. Roper*, 3 Drew. 299; *Bell v. Wilson*, 2 Dr. & Sm. 399. This is essentially true in lead, coal and zinc mines, but not so in placer mines. 2 Bouv. Law Dict. 185; 15 Amer. & Eng. Enc. Law, p. 501.

<sup>2</sup> *Shaw v. Wallace*, 1 Dutch. (N. J.) 453, 462; *Bell v. Wilson*, *supra*.

<sup>3</sup> 2 Bouv. Law Dict. 180; Am. & Eng. Enc. of Law, Vol. 15, p. 501; *Jersey v. Mott*, 22 Q. B. D. 555.

<sup>4</sup> Authorities, *supra*; *Ind. R. Co. v. Haunchwood*, 22 Ch. D. 552; *Loosemoore v. Tiverton & c. Ry. Co.*, 22 Ch. D. 25; *Mid. Ry. Co. v. Miles*, 33 Ch. D. 632; *Dixon v. Cal. R.*, 5 App. Cas. 820.

<sup>5</sup> *Bainbridge on Mines*, 2-3; *Darvill v. Roper*, 3 Drew. 294; *King v. Durford*, 2 Ad. & El. 568; *s. c.* 4 Nev. & Man. 349; *Cleveland v. Mayrick*, 16 W. R. 105; *MacSwinney on Mines*, p. 4.

<sup>6</sup> Authorities above; *Darvill v. Roper*, *supra*; *Bell v. Wilson*, *supra*. But see *Jacob's Law Dict.* for a definition at variance with the text which *MacSwinney* declares to be inaccurate, *MacSwinney*, p. 4, foot note.

<sup>7</sup> *Ross v. Wainman*, *supra*; *Micklethwait v. Winter*, *supra*; *Midland Ry. Co. v. Checkley*, Law Rep. 4 Eq. 19. But see *Bell v. Wilson*, 1 L. Rep. Ch. App. 303; 2 Drew. & Sm. 395; *Hext v. Gill*, L. R. 7 Ch. App. 699; 3 Mook En. Rep. 574.

which stone only is taken are more frequently and properly referred to as quarries.<sup>1</sup> And this suggests the legal distinction between a mine and a quarry.

§ 3. **Same — Mine distinguished from quarry.** — Quarry is usually defined to be a place where stone is dug;<sup>2</sup> it is perhaps derived from the French word, “quarriere,” said by lexicographers to mean a place where stone is quadrated, or cut in squares.<sup>3</sup> This is still the popularly accepted meaning of the word. Hence, a quarry is a place where stone is dug; the pit, from which the stone is removed, as well as the surrounding surface where the stone is dressed.<sup>4</sup> Some writers who are of unquestionable authority state that the true test of determining whether a given excavation is a mine or quarry is solely the mode of working.<sup>5</sup> MacSwinney says the sole question is “whether you are working so as to remove the surface,” with or without leaving the roof; that if the surface is removed it is a quarry;<sup>6</sup> if a roof is left it is a mine.<sup>7</sup> This, however, is not found to be an

<sup>1</sup> *Rex v. Sedgley*, 10 M. M. R. 390, is an exception to the rule stated in the text, for in this case stone, taken at a great depth, raised by shafts, from which the stratum was worked as other ore, was held to be a “stone mine.” But see *Hedley v. Fenwick*, 8 H & C. 349; *Midgley v. Richardson*, 14 M. & W. 595; *Mansfield v. Crawford*, 9 Ir. Eq. 271; *Rex v. Dunsford*, 4 Nev. & Man. 349.

<sup>2</sup> Webster's Dict.; Johnson's Dict.; Worcester's Dict.; Wharton's Law Lex.; Bouvier's Law Dict.; Anderson's Law Dict.; MacSwinney on Mines, p. 3.

<sup>3</sup> Encyclopædia Metropolitana; Enc. Brit.; Bainbridge on Mines, 2-3; 15 Amer. & Eng. Enc. Law, p. 504 and cases cited.

<sup>4</sup> Bainbridge on Mines, 2-3; MacSwinney on Mines, 3-4; *Jones v. Cawmorthen Co.*, 5 Ex. D. 95.

<sup>5</sup> “The question is whether you remove the surface; directly you cease to excavate from the surface, it ceases to be a quarry.” MacSwinney, p. 4; *Darvill v. Roper*, 8 Drew. 299; *Cleveland v. Mayrick*, 16 W. R. 105; *Bell v. Wilson*, 2 D. & S. 399; *Brown v. Chadwick*, 7 Ir. C. L. Rep. 188; *Listowell v. Gibbings*, 9 *Ib.* 233; cited by MacSwinney, *supra*.

<sup>6</sup> *Idem*.

<sup>7</sup> *Idem*.

accurate test, as gold is mined in the United States in places where only the surface is removed, and this, according to Mr. MacSwinney, would be a quarry, yet it is called mining. Neither would the character of the geological formations of the substance removed alone be found a reliable test for distinguishing a mine from a quarry, — as a place where clay,<sup>1</sup> limestone<sup>2</sup> and freestone<sup>3</sup> are obtained by underground workings has been judicially held to be a mine,<sup>4</sup> — but the true distinction lies in the different meaning of the terms themselves and the mode of working, or nature of the excavation, as well as the character of the substance removed, one or all of which may be noted as the distinguishing features between a mine and a quarry.<sup>5</sup> However, the same general rules of law apply to quarries and wells for oil, that govern other species of mining,<sup>6</sup>

<sup>1</sup> *Rex v. Brettley*, 3 B. & Ad. 424; *Rex v. Brown*, 8 East, 528

<sup>2</sup> *Rex v. Sedgley*, 2 B. & Ad. 65; 10 Mor. Min. Rep. 390.

<sup>3</sup> *Rex v. Dunsford*, 2 A. & E. 568.

<sup>4</sup> *Ante. Idem.*

<sup>5</sup> *Rex v. Alderbury*, 1 East, 534; *Brown v. Chadwick*, 7 Irish Law Rep. (N. S.) 101; *Hext v. Gill*, L. R. 7 Ch. App. 699; *Darvill v. Roper*, 8 Drew. 294; *Countess of Listowell v. Gibbings*, 9 Irish L. Rep. (N. S.) 228; *Rex v. Sedgley*, 2 Barn. & Ad. 65; *Rex v. Brettley*, 3 B. & A. 424. *Rex v. Dunsford*, 2 A. & E. 568; *Astroy v. Ballard*, 2 Mad. 193; Whether an excavation is a mine or a quarry is a question of fact. *Blan. & Weeks Ld. Cas.*, p. 20. "The distinction between a mine and a quarry is, that in a quarry the surface is removed, and in mining the beginning only is on the surface, and a roof is left overhead." *Darvill v. Roper*, 8 Drew. 298; s. c. 24 L. J. Ch. 779; see *Cleveland v. Mayrick*, 37 L. J. Ch. 125; s. c. 17 Law Times R. (N. S.) 238; *Brown v. Chadwick*, 7 Irish C. L. 101; M. M. D. 284. "A limestone working, where the stone is taken out through shafts and tunnels, is a mine." *Rex v. Sedgley*, 2 B. & Ad. 65. The distinction between mines and quarries stated. *Listowell v. Gibbings*, 9 Irish C. L. 228; M. M. D. 234, 334.

<sup>6</sup> *Ante, idem.* As to stone, see *Micklethwait v. Winter and Ry. Co. v. Checkley*, *supra*. Oil is a mineral. *Thompson v. Noble*, 3 Pitts. 201; *Kler v. Peterson*, 41 Pa. St. 357; *Dark v. Johnson*, 55 Pa. St. 164. So is china clay. *Hext v. Gill*, 7 Ch. App. 609. And asphaltum. *Gesner v. Gas Co.*, 1 James (N. S.) 72; 2 Allen (N. B.), 595. Limestone is not. *Copp's Min. Dec.*, pp. 194, 297.

and in the treatment of the subject in the following pages there will be no distinction made, as to the application of the law, except as noted.

§ 4. **Nature and definition of minerals.** — An equally essential element of a mine, with the excavation from which the same is taken, is the ore or mineral,<sup>1</sup> to obtain which the excavation is made. Without the mineral the excavation would be but a shaft or pit and its existence is certainly as necessary to constitute a mine as the means by which it may be acquired.<sup>2</sup> But the mine does not, necessarily, extend as far as the mineral may run; it is simply the hole or pit from which the ore is taken.<sup>3</sup> Some authorities hold that "pay mineral" must be found in order to constitute a hole or pit a mine, within the legal definition of the term,<sup>4</sup> but according to others the accepted definition<sup>5</sup> of a mine would seem to be a hole *made for the purpose of obtaining mineral*, and where it was found, even though "pay mineral" was not found in the same.<sup>6</sup> Minerals are generally defined to be fossil bodies, or matters forming part of the substance of the earth.<sup>7</sup> Bouvier

<sup>1</sup> *Legge v. Legge*, 15 Mor. Min. Rep. 130; *Bell v. Wilson*, *supra*.

<sup>2</sup> *Elias v. Snowden Co.*, 15 M. M. R. 143; *Darvill v. Roper*, *supra*.

<sup>3</sup> *Ross v. Wainman*, *supra*, and authorities *ante*; *Shaw v. Wallace*, *supra*; *Pierce v. Tidwell*, 81 Ala. 299. When the vein is exposed or opened it becomes a mine. *Astray v. Ballard*, 2 Mod. 193.

<sup>4</sup> B. & W. L. C., p. 13 (Web. Dict.). Dr. Johnson's definition is "a place or cavern in the earth *which contains metals or minerals*." Land may contain mineral and yet not be a mine. *Ah Yew v. Choate*, 24 Cal. 562. As limiting the definition, see *Pierce v. Tidwell*, 81 Ala. 299.

<sup>5</sup> *Darvill v. Roper*, 8 Drew. 294; L. C. 24 L. J. Ch. 779, where it is said: "Mining is when you begin only on the surface, and by sinking shafts, or driving lateral drifts, you are working so that you make a pit or tunnel, leaving a roof overhead." B. & W. L. C. 13 *et sub*.

<sup>6</sup> Am. & Eng. Enc. of Law. (1 Ed.), Vol. 15, p. 500; *Pitt v. Williams*, 5 Ad. & El. 885; *Hill v. Smith*, 27 Cal. 476. The term implies "underground working." *Bell v. Wilson*, 55, L. J. Ch. 337.

<sup>7</sup> *Micklethwait v. Winter*, 6 Exch. 644; s. c. 20 L. J. Exch. 313; 5

defines minerals to be: “\* \* \* matters dug out of mines or quarries.<sup>1</sup> \* \* \*” His definition may be

Eng. Law & Eq. 526. The term embraces “the bare granite of the loftiest mountains as well as the deepest hidden diamonds and metallic ores.” *Midland R. Co. v. Checkley*, L. R. 4 Eq. 19; *Earl of Ross v. Wainman*, 14 M. & W. 859; *s. c.* 2 Exch. 800; 15 L. J. Exch. 67; *Broom Leg. Max.* 175, 176; 2 *Bouv. Law Dict.* 180-181; *Webster’s Dict.*; *Bell v. Wilson*, 1 L. Rep. Ch. App. 303, holding that freestone was not included within the term mineral; *Blanchard & Weeks Ltd. Cas.* 14; *Darvill v. Roper*, 8 *Drew.* 294. The term includes gravel, marble, fire clay and the like, and every species of stone comes within the same category. *Midland Ry. Co. v. Checkley*, *supra*; *McLaughlin v. Powell*, 50 Cal. 64; *Gesner v. Gas Co.*, 1 *Jas. (N. S.)* 72; 2 *Allen (N. B.)* 595; *Thompson v. Noble*, 3 *Pitts.* 201; *Kier v. Peterson*, 41 *Pa. St.* 357; *Dark v. Johnson*, 55 *Pa. St.* 164; *Hext v. Gill*, *Law R.* 7 Ch. App. 699; 3 *Mook*, 574; *Jeasey v. Math*, 22 *Q. B. D.* 555. But there is authority for limiting the term minerals to substances taken from mines, and excluding the products of quarries. *Darvill v. Roper*, 24 *L. J. Ch.* 779. “The most precise definition of minerals would be inorganic bodies, possessed of definite chemical composition, and usually of a regular geometric form.” — *Enc. Brit.* Minerals are either solids, liquids or gases, but the first two are by far the most important classes. Minerals in a solid shape are referred to as crystalline bodies, while minerals which do not possess a definite geometric form are called amorphous bodies.

Petroleum, by Act of Congress, is made mineral. Act Cong. Feb. 11, 1897; 29 *U. S. Stat.* at L. 526; *R. S. U. S.* 549. Prior to this act it was judicially held to be mineral. *Gird v. Cal. Oil Co.*, 60 *Fed. R.* 531; *Nevada Oil Co. v. Miller*, 97 *Fed. Rep.* 681; *Lindley on Mines*, Sec. 138; *Gill v. Weston*, 110 *Pa. St.* 313; *Murray v. Allred*, 100 *Tenn.* 100; *Williamson v. Jones*, 39 *W. Va.* 231. But see, *Dunham v. Kirkpatrick*, 101 *Pa. St.* 43; 20 *Am. & Eng. Enc. Law* (2 Ed.) 683, 698. Natural gas held to be mineral. *Murray v. Allred*, *supra*. Asphalt held to be mineral. *Gesner v. Cairns*, 7 *N. Bruns.* 595. Lustral, or “paint stone,” is also held to be mineral. *Johnson v. Cal. Lustral Co.*, 127 *Cal.* 283. And so is stone. *Freezer v. Sweeney*, 8 *Mont.* 508; *Johnson v. Harrington*, 5 *Wash.* 73. But see, *contra*, *Wheeler v. Smith*, 5 *Wash.* 704. Stone is mineral now by Act of Congress. *U. S. S. at L.* 348, c. 375; *Am. & Eng. Enc. Law*, *supra*. Albertite, alum, auriferous cement, auriferous clay, borax, carbonate of soda, fire clay, kaoline, graphite, black lead, gypsum, iron, agate, opals, phosphate, potash, soda, slate and onyx, are all held by the Land Office Department to be minerals. 20 *Am. & Eng. Enc. Law* (2 Ed.), p. 698, and land office decisions there cited.

<sup>1</sup> *Bouv. Law Dict.*, Vol. 2, 180 *et sub.*

substantially correct, but in describing the means of acquisition, he limits the application of his definition. The term includes all substances comprising part of the solid body of the earth.<sup>1</sup> The formations may be either external or internal, and in applying the term to matters dug only from the interior of the earth, the definition is, of course, in this particular, defective. The term mineral, however, includes metallic as well as non-metallic substances, such as coal,<sup>2</sup> ironstone,<sup>3</sup> and freestone,<sup>4</sup> fire clay, china clay and porcelain clay,<sup>5</sup> and also every kind of gravel and sand,<sup>6</sup> located beneath the surface of the soil.<sup>7</sup> But substances included under the term minerals are destitute of animal or vegetable life and are generally incapable of supporting either,<sup>8</sup> although the term includes all matter that forms or ever formed a part of the solid body of the earth.<sup>9</sup> Minerals are either composed of uncombined

<sup>1</sup> *Ante, idem.* "Every substance got from within the surface of the earth for profit, is mineral." *M. R. Co. v. Checkley*, 4 Eq. 25; *Hext v. Gill*, 7 Ch. 712; *Gowan v. Christie*, L. R. 2 Sc. & D. 277; *Tucker v. Linger*, 21 *Id.* 25, 35; *Loosemore v. Tiverton*, 22 *Id.* 42; *ante, idem.* Minerals are also located in lodes and veins that have never been mined, but are none the less minerals. *MacSwinney on Mines*, p. 12. This definition also impliedly excludes oils and other liquids.

<sup>2</sup> *Salisbury v. Gladstone*, 6 H. & N. 127.

<sup>3</sup> *Mawson v. Fletcher*, 6 Ch. 91-94.

<sup>4</sup> *Bell v. Wilson*, 1 Ch. 307.

<sup>5</sup> *Errington v. Met. Ry. Co.*, 19 Ch. D. 571, 578.

<sup>6</sup> *Cowley v. Wellsley*, 1 Eq. 659. But see *contra*, *Brown's Tr.*, 11 W. R. 19.

<sup>7</sup> *Bell v. Wilson*, *supra*; *MacSwinney on Mines*, p. 12, and cases cited. The term mineral is similarly defined in the following cases: *Freezer v. Sweeney*, 8 Mont. 508; *Hartwell v. Camman* (N. J.), 64 Amer. Dec. 448; *Henry v. Lowe*, 73 Mo. 96; *Caldwell v. Fulton*, 31 Pa. St. 475; *Murray v. Allred*, 100 Tenn. 100; *State v. Parker*, 61 Texas, 265; *Wheeler v. Smith*, 5 Wash. 704; 20 Am. & Eng. Enc. Law (2 Ed.), p. 683.

<sup>8</sup> *Ross v. Wainman*, 14 M. & W. 859; *Micklethwait v. Winter*, 6 Exch. 644; 5 Eng. L. & Eq. 526; 2 Bouv. Dict. 180; *Hartwell v. Camman*, 10 N. J. Eq. (2 Stock) 128; s. c. 64: Am. Dec. 448; *Griffin v. Fellows*, 81 Pa. St. 114.

<sup>9</sup> *Copp's Min. Lands*, pp. 50, 161, 172, 148, 309; Am. & Eng. Enc. of Law, Vol. 15, pp. 500-501.



elements in their natural state, or from compounds of these elements formed in accordance with chemical laws,<sup>1</sup> but the chemical character of minerals belongs principally to a work on chemistry or mineralogy, and it is deemed unnecessary to deal further with the subject here.

§ 5. **Same—Veins, seams, and lodes.**—Vein, seam, and lode are often used as convertible terms, conveying the same impressions,<sup>2</sup> and their distinction, although judicially noted<sup>3</sup> is perhaps more technical than practical. A vein is a layer of mineral substance filling fissures or crevices in rocks and differing in nature from the rocks in which the fissures occur.<sup>4</sup> A seam is not necessarily different from the formation in which it may appear and is narrower than a vein,<sup>5</sup> hence, is a thin layer or stratum; “a narrow vein between two thicker ones.”<sup>6</sup> Lodes are also defined as “fissures, filled with mineral

<sup>1</sup> Webster's Dictionary; Bainbridge on Mines, § 2. See Dana, Min., pt. II, p. 191. The most scientific definition is given by Dana, *i. e.*: “Any natural production, formed by the action of chemical affinities and organized, when solid, by the powers of crystallization,” *ante*. But see 5 Watts, (Pa.) 84; 1 Crabb. R. P. 95.

<sup>2</sup> MacSwinney on Mines, p. 2.

<sup>3</sup> United States v. Iron S. M. Co., 24 Fed. Rep. 568, per Field, J.

<sup>4</sup> Enc. Britannica (Vol. 17), p. 621; *Idem*, 15, p. 177; Webster; Richardson.

<sup>5</sup> Webster's Dictionary; MacSwinney on Mines, p. 2.

<sup>6</sup> This is Webster's definition. “Lode,” “ledge,” and “vein” are used interchangeably and held to be synonymous terms. North Noonday M. Co. v. Orient M. Co., 6 Saw. (U. S.) 299; U. S. v. I. S. M. Co., 128 U. S. 673; Shoshone Co. v. Rutter, 87 Fed. Rep. 801; I. S. M. Co. v. Mike & Co., 143 U. S. 394; Con. Wy. M. Co. v. Champion Co., 68 Fed. Rep. 540; Stinchfield v. Gillis, 96 Cal. 33; Beals v. Cone, 27 Colo. 473; Golden Terra Co. v. Smith, 2 Dak. 374; Burk v. McDonald, 2 Idaho, 646; Butte Min. Co. v. Soc. Anonyme, etc., 23 Mont. 177; Casey v. Thieviege, 19 Mont. 341; Jones v. Prospect Mt. Co., 21 Nev. 339; Illinois S. M. Co. v. Raff, 7 N. M. 386; Hayes v. Lavagnino, 17 Utah, 185; Ralsbeck v. Anthony, 73 Wis. 572; 20 Am. & Eng. Enc. Law (2 Ed.), 693, 713.

matter,<sup>1</sup> or, perhaps more scientifically, as aggregations of mineral matter, containing ores in fissure."<sup>2</sup> Hence, it will be seen that a seam is a narrow vein and a vein and lode are practically the same thing.<sup>3</sup> The mining acts of Congress use the words "vein," "lode," and "ledge," interchangeably and all have been judicially defined to mean the same thing, *i. e.*: "A zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock."<sup>4</sup> In a sense, however, the courts have distinguished a vein from a lode, as a lode has been held capable of containing more than one vein;<sup>5</sup> it has been held to be fixed and immovable, while the "vein matter" composing it might be loose and disintegrated<sup>6</sup> and detached masses of ore, underlying debris, although contiguous to the ore in place, have been held not such "continuous sheets of ore between defined boundaries," as to come within the term lode.<sup>7</sup> As the

<sup>1</sup> Webster; Van Cotta on Ore Deposits, Prime's Tran. 26; Eureka Min. Co. v. Richmond Min. Co., 4 Sawyer, 811; Foote v. Nat. Min. Co., 2 Mont. 402.

<sup>2</sup> *Ante, idem.* See Prime's Tran. Van Cotta on Ore Dep., p. 26. Geology teaches that veins and lodes are younger formations than the rocks in which they are encased. — *Enc. Brit.*

<sup>3</sup> MacSwinney uses the term vein, but in the index to his work the word *lode* does not appear.

<sup>4</sup> Eureka Co. v. Richmond Co., *supra*. "It includes all deposits of mineral matter, found through a mineralized zone or belt, coming from the same source, impressed with the same forms and appearing to have been created by the same process." *Idem*; Mt. Diablo Co. v. Collison, 9 M. M. R. 616; Iron Silver Mine Co. v. Cheesman, 9 *Idem*, 252; Leadville Mine Co. v. Fitzgerald, 4 *Idem*, 380; Jupiter Co. v. Bodie Co., 4 *Idem*, 411; N. Noonday Co. v. Orient Co., 9 *Idem*, 529; Stevens v. Williams, 1 *Idem*, 566.

<sup>5</sup> "A lode may and often does contain more than one vein." United States v. Iron and Silver Min. Co., 24 Fed. Rep. 568; Bar. & Adams on Mines — a late work — pp. 487-8.

<sup>6</sup> Stevens v. Williams, *supra*.

<sup>7</sup> Leadville Co. v. Fitzgerald, 4 M. M. R. 380; Jupiter Co. v. Bodie Co., *supra*.

legislature has used these terms interchangeably, however, and the scientific definition of the terms is so similar, it would apparently seem that in drawing legal distinctions between the words the intention of the legislature has been disregarded and these distinctions used, in the absence of more accurate terms, to gauge the rights of litigants.

§ 6. "Placer" and "lode" mines distinguished. — "Veins," "lodes" and "seams," all refer to mineral deposits contained in the native rock, as distinguished from those other deposits not so located.<sup>1</sup> "Placers" indicate just the opposite from "lode" mines — and the ordinary meaning that would attach to the term itself — and refer to other forms of deposit than veins of quartz or other rock in place.<sup>2</sup> Placer mines, as such, are not mentioned by MacSwinney<sup>3</sup> but are well known to the mining of the Western States and sections where free ore is found. The rights

<sup>1</sup> *Ante*, Reynolds v. Iron, Sil. Mining Co., 116 U. S. 687; Montana Copper Co. v. Dohl, 6 Mont. 181; Clory v. Hazlitt, 67 Cal. 286; Iron, Sil. Mining Co. v. Sullivan, 16 Fed. Rep. 829.

<sup>2</sup> U. S. Rev. St., Sec. 2329; Copp's Mine Lodes, p. 52; U. S. v. Iron, Sil. Min. Co., 128 U. S. 673. "Placers" are superficial deposits, which occupy the beds of ancient rivers or valleys. Maxey v. Wilkerson, 2 Mont. 421; Brown v. 49 and 56 Min. Co., 15 Cal. 153; Tabor v. Dexter, 9 Mor. Min. Rep. 614; Copp's Min. Lands, p. 453; Carpenter's Mine Code, 71. A "placer" mine is mineral "in the earth, sand, or gravel;" "ground that includes valuable deposits not in place, *i. e.*, not fixed in the rock, but which are in a loose state, and may, in most cases, be collected by washing or amalgamation, without milling." United States v. Iron, Sil. Min. Co., 128 U. S. 673. "Auriferous cement in the ground is a placer mine." Copp's Min. Land, p. 83. But copper and cinnabar in the rock are lodes not placers. *Idem*. But gold, bearing gravel, although located between crevices in the rock, is not a "lode" but a "placer" mine. Gregory v. Pershbaker, 73 Cal. 109; *s. c.* 15 Mor. Min. Rep. 602. The distribution of alluvial gold deposits is very extensive, the most important occurring in America and Australia. Free gold is also found in Mexico, Central America, Europe, Africa, South America and India.—*Enc. Brit.*

<sup>3</sup> MacSwinney fails to mention them.

of property in placer mines — and corresponding relations arising therefrom — were a portion of the American common law, *i. e.*, the customs and uses of the mining sections,<sup>1</sup> prior to the government's recognition of these rights,<sup>2</sup> but the term has long since been generally recognized as well by the general government as the courts of the United States. The rights of the owners of placer mines are the same as the property rights attaching to other kinds of mines, and in the application of the law of property, in this sense, there is no distinction.<sup>4</sup> Under the Government Statutes and Land Office Decisions, however, pertaining to mining on the public lands, there are marked distinctions between "placer" and "lode" claims, as will be noted hereinafter.<sup>5</sup>

<sup>1</sup> See Wade's American Mining Laws.

<sup>2</sup> Webster gives the definition approved by usage in Mexico and California. Bar. & Adams on Mines & Mining in the U. S., p. 479. See definition in Soone's, Newman & Barrett (by Valaquez): "A place near a river bank, where gold is found." *Ante*. Blanchard & Weeks *Ld. Cas.* on Mines & Mining, 52-94.

<sup>3</sup> R. S. U. S., Sec. 2329 (July 9, 1890); *Gregory v. Pershbaker*, 73 Cal. 109 (1887). The late Justice Field, — than whom there is no better authority on the subject at hand — referring to the origin of placer mines, observed; "Whatever the origin of the subterranean channels, containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be and generally spoken of as the beds of ancient rivers in which the gravel was deposited by fluvial action and which were either from their beginning, subterranean, or upon which the superincumbent earth or rock, has been hurled by means of convulsions caused by volcanic or other natural force." *Eureka case*, 4 Saw. 302; *Eureka Co. v. Richmond Co.*, 8 Mor. Min. Rep. 144; *Id.* 9 M. M. R., 578.

<sup>4</sup> "The rights of the owner to the minerals under a placer claim are the same as those of any other owner of the soil." Barringer and Adams, *Mines and Mining in the United States*, p. 478.

<sup>5</sup> R. S. U. S.: 2329. A placer claim contains 160 acres. *Smelting Co. v. Kemp*, 104 U. S. 636; *Tucker v. Mosser*, 113 *Id.* 203. A lode claim is 1500 ft. by 300 ft. on either side of the center of the vein at the surface. R. S. U. S., Sec. 2320; *Silver Min. Co. v. Elgin Co.*, 118 U. S. 196.

§ 7. **Soil and subsoil not mineral.** — The terms soil<sup>1</sup> and subsoil,<sup>2</sup> when used in their broadest sense, of lands, tenements and hereditaments,<sup>3</sup> would of course include all mines located on the surface as well as all mineral deposits beneath,<sup>4</sup> for these are a part of and included, *prima facie*, in the term “soil” or “land;” but the term “mineral” is not so broad as to include the land or soil, for, as suggested in an early case, if such an extensive meaning is to be applied, then in cases of exception in grants of land, of the mineral deposits contained, the exception would be broad enough to include the grant.<sup>5</sup> Soil and subsoil are most frequently used as synonyms for land, surface and underlying strata, which in a legal sense is broad enough to include all erections on the surface, the surface of the soil and all minerals beneath;<sup>6</sup> but

<sup>1</sup> “Soil, *prima facie*, includes the surface and all that is beneath it to the center of the earth.” MacSwinney, p. 21; *Pretty v. Sally*, 26 Beav. 606; *Wakefield v. Buccleuch*, 4 Eq. 624.

<sup>2</sup> This is substantially the same, embracing the under soil and downward, including mineral deposits, to center of the earth. *Cox v. Glue*, 5 C. B. 549; *Atkinson v. King*, 3 L. R. (Ir.) 339.

<sup>3</sup> Land includes the term mineral. *Shep. Touch.* 90; *Newcolme v. Coulson*, 5 Ch. D. 142; *McDonnell v. McKinty*, 10 Ir. L. R. 514-524. And the terms “tenement and hereditaments” also includes mines and minerals. *Dunn v. Birmingham Canal Co.*, L. R. 8 Q. B. 47, 48; *Errington v. Met. R. Co.*, 19 Ch. D. 568; *Loosemore v. Tiverton R. Co.*, 22 Ch. D. 43.

<sup>4</sup> MacSwinney on Mines, pp. 19, 20 and 21.

<sup>5</sup> See *Bell v. Wilson*, 1 Ch. 308. “Kindersley said mineral would include the mould or loam, which lies more immediately at the surface, and on which the verdure grows and thrives, but with such an extensive meaning as this a grant would be altogether destroyed by an exception.” *Mid. R. Co. v. Haunchwood Co.*, 20 Ch. D. 555; MacSwinney, p. 19; *Townley v. Gibson*, 2 T. R. 701. “Mines” and “minerals” has also been held not to include brick clay immediately under the surface. *Church v. Ind. Com.*, 11 C. B. (N. S.) 664. But see *Cowley v. Wellesley*, 1 Eq. 659; *Tucker v. Linger*, 21 Ch. D. 27-39; *Errington v. Met. Ry. Co.*, *supra*, holding fire clay, in certain cases, to be mineral.

<sup>6</sup> See *Tiedeman Real Prop.*, Chap. 1, where the term *land* and the different elements that go to make up the whole are scientifically discussed.

the term mineral, of itself but a component part of what is necessary to go to make up the term land, is therefore incapable, as a part, of including the whole.<sup>1</sup>

<sup>1</sup> *Ante, idem.* But if the subsoil contains mineral, it would be classed with the minerals, as well as the minerals themselves. *Eardley v. Granville*, 3 Ch. D. 826.

## CHAPTER II.

### PROPERTY IN MINES AND MINERALS.

#### SECTION 8. Ownership of minerals.

9. Title may be distinct.
- 9a. Implied power to mine.
10. Same — How severance effected.
11. Property in mines in reversion.
12. Same — Shaft — Drift and containing chamber.
13. Mineral under streets and highways.
14. Mineral deposits under railroads.
15. Minerals under rivers and seas.
16. Nature of property in oil.
17. Same — Natural gas.
18. Minerals claimed adversely.
- 18a. Same — When mineral has been conveyed.

§ 8. **Ownership of minerals.**— Under the theory that the sovereign is the absolute owner of the soil, the ownership of minerals, in England and formerly in the United States, was held to be in the crown.<sup>1</sup> In this country prior to the Revolution, all lands were held mediately, or immediately, by grants from the crown,<sup>2</sup> and whatever minerals the land contained were conveyed in these royal charters as part and

<sup>1</sup> This is still the law in most nations. Blackstone derives the right as an incident to the royal prerogative to coin money. 1 Com. 294; Am. and Eng. Enc. of Law, Vol. 15, p. 507. But in *Case of Mines* (1 Plowd. 310) it was held to be based upon the right of coinage and the king's divine right to have the best; as to the rule among European nations, see Jacob's "History of the Precious Metals," pp. 46, 139, 141; Yale on Mines, 13, 44; *Moore v. Snow*, 17 Cal. 222; s. c. 79 Am. Dec. 123; *Costello v. U. S.*, 2 Black (U. S.), 17; 1 W. & M. Ch. 30; 8 W. & M. Ch. 6; Rogers on Mines, Ch. 4; MacSwinney on Mines, p. 40 and cases cited.

<sup>2</sup> Bainb. on Mines and Min., n., 37, 38; 3 Kent's Com. 378; 1 Plowd. 310; *Fremont v. Flower*, 17 Cal. 199; *Moore v. Snow*, 17 Cal. 203-223; *Jackson v. Ingraham*, 4 Johns. 163; *Jackson v. Waters*; 12 *Id.* 365. B. & W. L. C. 86.

parcel of the soil.<sup>1</sup> But the doctrine of absolute ownership, as an incident of sovereignty, with the changing laws of society in America, has long since been abolished,<sup>2</sup> and although the right of tenure is derived originally from the State or government, the title to minerals is now held to pass concurrently with the ownership of the land.<sup>3</sup> The theory now obtains in the United States that land held by the government is for the individual citizen's benefit, and in accordance with the popular will, Federal laws have been passed, granting citizens the right to use the public land for mining purposes.<sup>4</sup> It is now well settled, how-

<sup>1</sup> *Ante, idem*; *Walt's Acts & Def.*, Vol. 4, p. 421; *B. & W. L. C.* pp. 86, 87; *Case of Mines*, 1 *Plowd.* 336; *Witherspoon v. Duncan*, 4 *Wall.* 210; *Ry. Co. v. Prescott*, 16 *Wall.* 604; *Am. Law Rev.*, Vol. 2, p. 388. Theoretically, at least, in the United States, the property in precious metal, is in the government. *Bainb. on Mines* (5 Ed.), 189.

<sup>2</sup> *Yale's Min. Rights*, Ch. 18; *B. & W. L. C.*, p. 89.

<sup>3</sup> *Ah Hee v. Crippen*, 19 *Cal.* 491; *Min. Co. v. Boggs*, 3 *Wall.* 304; *s. c.* 14 *Cal.* 379; *U. S. v. Costellero*, 2 *Black* (U. S.), 17; *U. S. v. Parrott*, 1 *McAll.* 371; *Tremont v. U. S.*, 17 *How.* (U. S.) 542; *Goldhill Q. M. Co. v. Ish*, 5 *Oreg.* 104; *Hartwell v. Camman*, 10 *N. J. Eq.* 128; *Hurswill v. Howes*, 6 *Bush* (Ky.), 232. By virtue of the king's right of coinage, all precious metals, at common law, were held to belong to the crown. 1 *Bl. Com.* 294; *Collyer on Mines*, p. 2; *Rex v. Northumberland*, 1 *Plowd.* 336; *Seaman v. Vawdrey*, 16 *Ves. Jr.* 393; *Esquimalt Co. v. Bainbridge*, *A. C.* 561; 20 *Am. & Eng. Enc. Law* (2 Ed.), 683.

<sup>4</sup> "In 1785, the Continental Congress reserved one-third part of gold, silver, lead, and copper mines, but this principle was afterward abandoned. Salt springs and lead mines were reserved by subsequent laws and leased by the government. The former were generally given to the new States on their admission, but under restrictions they could not be sold, nor leased for a period exceeding ten years. A more liberal policy has prevailed of late years. By acts passed in 1846 (9 *Stat. at L.* 37) and 1847 (*Id.* 181) the States were authorized to dispose of their salt springs, and lead and copper mines in the Northwest were thrown open to settlers and made subject to pre-emption. The acts of July 1st, 1864 (13 *Stat. at L.* 343) and March 8d, 1865 (*Id.* 529) threw open coal lands to entry, but fixed the minimum price at twenty dollars per acre, instead of allowing pre-emption at the ordinary rate." (*Am Law. Review*, Vol. 2, p. 388.) *B. & W. L. C.* 89 *et sub.* For a history of Federal legislation on this subject, see *Yale's Min. Rights*, Chap. 18.



ever, that the title to all minerals in the land belongs to the owner of the soil<sup>1</sup> and whether it is the government or a private individual, the right or title to such mineral can only be acquired by some grant or conveyance from the owner.<sup>2</sup>

§ 9. Title may be distinct. — The title to minerals may be distinct from the title to the soil;<sup>3</sup> a mine may form a separate possession and different inheritance from the land,<sup>4</sup> and it is quite common in mining districts for the ownership of the soil to be vested in one person and that of the mines in another.<sup>5</sup> This double ownership in lands results from the composite elements

<sup>1</sup> Bainb. Mines, 4; 1 Bl. Com. 294; 2 Wash. R. P., Bk. 2, Ch. 1, § 3, *subd.* 62; Williams R. P. 14; 3 Kent, 378; McDow on Mines, 26; 1 Am. Law Reg. (N. S.) 578; Caldwell v. Copeland, 37 Pa. St. 427; Boggs v. Merced Min. Co., 14 Cal. 279; 3 Wall. (U. S.) 304; Ah Hee v. Crippen, 19 Cal. 491; U. S. v. Parrot, 1 McAll (U. S.), 271; Stratton v. Lyons, 53 Vt. 641; Gold Hill Quartz Co. v. Ish, 5 Oreg. 104; Dugan v. Doan (Dak.), 26 N. W. Rep. 887; 2 Nev. 168; 6 Bush, 232; B. & W. L. C. 30.

<sup>2</sup> Lyon v. Gormly, 53 Pa. St. 261; Evans v. Haefner, 29 Mo. 141; Sloan v. Furnace Co., 29 Ohio, 568; Caldwell v. Copeland, 37 Pa. St. 427; Whitaker v. Brown, 46 Pa. St. 197; Hartwell v. Camman, 10 N. J. Eq. 128; Pretty v. Sally, 20 Beav. 606; Stewart v. Chadwick, 8 Iowa, 463; 2 Nev. 168; B. & W. L. C., *supra*.

<sup>3</sup> Bainb., Secs. 2, 3; Rogers, Chap. 8-9; B. & W. L. C., p. 30 *et sub.*; Curtis v. Daniel, 10 East, 276; Barnes v. Mawson, 1 M. & S. 85; Rowe v. Grenfel, Ryan & Moody, 396. A vein of mineral is land unless distinguished by a separate conveyance or an exception. Wilkinson v. Proud, 11 M. & W. 33. A lease of minerals does not carry the surface. Tyrwith v. Wynne, 2 B. & A. 554; Caldwell v. Fulton, 31 Pa. St. 7; Casey, 475; Co. Litt. 104b; Godbolt cases, 24; Doe v. Woods, 2 B. & A. 719; Benson v. Miners Bank, 20 Pa. St. 8; Norris, 370; Armstrong v. Caldwell, 53 Pa. St. 3; P. F. Smith, 284; Harlan v. Coal Co., 35 Id. 11; Casey, 287; Stewart v. Chadwick, 8 Clarke (Iowa), 463; U. S. v. Costellero, 2 Black (U. S.), 168; Riddle v. Brown, 20 Ala. 412; Desloge v. Pearce, 38 Mo. 588; Zinc Co. v. Franklynite Co., 13 N. J. Eq. (Beas.) 322; Ryckman v. Gillis, 57 N. Y. 68; Grubb v. Grubb, 74 Pa. St. 25; Reynolds v. Cook, 33 Va. 817; Gillet v. Traganza, 6 Wis. 343; Coleman v. Chadwick, 80 Pa. St. 81; s. c. 20 Am. Rep. 93; B. & W. L. C., *supra*.

<sup>4</sup> Tiedeman on R. P., § 2 and cases cited.

<sup>5</sup> Authorities, *supra*.

of which the land itself is composed and its susceptibility of being divided up into these elements; hence, one man may own the erections on the soil, another the surface, and a third the minerals beneath the surface.<sup>1</sup> And not only may there be separate titles to the elements that compose the soil, but there may also be distinct ownership in different descriptions of minerals, or in different deposits or strata of the same kind of mineral.<sup>2</sup> One person, for instance, may own the iron and another the lead contained in the same tract of land,<sup>3</sup> and a third party can own one section or stratum of coal and a fourth party hold the title to another distinct seam of the same mineral,<sup>4</sup> while neither may possess the absolute title to the soil.<sup>5</sup>

<sup>1</sup> Tiedeman R. P., *supra*; 3 Washburn R. P., Bk. 2, Ch. 1, § 8, and Bk. 3, Ch. 5, § 4, p. 391; *Canfield v. Ford*, 28 Barb. (N. Y.) 336. Fee in minerals and surface may be distinct. *Smith v. Jones*, 21 Utah, 270; 60 Pac. Rep. 1104.

<sup>2</sup> *Ante, idem*; B. & W. L. C., pp. 33-36; *Caldwell v. Copeland*, 37 Pa. St.; 1; *Wright*, 437; *Kier v. Peterson*, 41 Pa. St. 5; *Wright*, 357; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Brown v. Carey*, 43 Pa. St. 495; *Salt Co. v. Neel*, 54 Pa. St. 4; *Smith*, 9; *Stewart v. Chadwick*, 8 Clarke (Iowa), 463. Each separate vein or strata may be owned by as many separate and distinct owners. *Ontario Nat. Gas Co. v. Goshfield*, 18 Ont. App. 626; *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. (N. S.) 186; *Barden v. Nort. Pac. Co.*, 154 U. S. 288; *Williams v. Gibson*, 84 Ala. 228; *Higgins v. Cal. Pet. Co.*, 109 Cal. 304; *Silva v. Rankin*, 80 Ga. 79; *Wilms v. Jess*, 94 Ill. 464; *Rogers v. Cox*, 96 Ind. 157; *Mickle v. Douglas*, 75 Iowa, 78; *Hartford Co. v. Cambria Co.*, 93 Mich. 93; *Beattie v. Rocky Branch Coal Co.*, 56 Mo. App. 221; *Butte M. Co. v. Sloan*, 16 Mont. 97; *Hawkins v. Pepper*, 117 N. Car. 407; *Burgner v. Humphry*, 41 Ohio St. 340; *Pringle v. Vista Coal Co.*, 172 Pa. St. 438; *Lee v. Baumgardner*, 86 Va. 315; 20 Am. & Eng. Enc. Law (2 ed.), 683.

<sup>3</sup> *Blanchards & Weeks Ld. Cas.*, p. 33. "It is settled that one person may be entitled to the iron ore, another to the limestone, a third to one seam or stratum of coal, and a fourth to a distinct stratum, this title distinct from the surface."

<sup>4</sup> *Bainb.*, § 4 and 5; *Ryckman v. Gillis*, 57 N. Y. (12 Lick.) 63; *s. c.* 15 Am. Rep. 464; *Adam v. Briggs Iron Co.*, 7 Cush. 361; *Stewart v. Chadwick*, 8 Clark (Iowa), 463; *Cullen v. Rich*, Bull. N. P. 201; *s. c.* 2 Str. 1142; B. & W. L. C. 33, *et sub.*

<sup>5</sup> *Carnahan v. Brown*, 60 Penn. St.; 10 P. F. Smith, 23; *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 241; *Clement v. Youngman*, 4 Wright,

§ 9a. **Implied power to mine.**—The owner of land has the right not only to the surface of the land, but he also has the right to claim whatever is below the surface, and although the minerals may constitute a distinct ownership and a different hereditament, from the land itself, the minerals, while in place, are none the less a part and parcel of the soil and in the absence of proof to the contrary, the title to the same is *prima facie* in the owner of the land.<sup>1</sup> But while the owner of the surface is presumed, in the absence of evidence of a contrary title, to be the owner of minerals beneath the surface, the title to minerals, even while in place, may constitute a distinct hereditament from the land itself and the owner of the mineral right may have such a reasonable use of the surface of the soil as will be necessary to the enforcement of his mineral rights.<sup>2</sup> This proposition is founded on the ancient and respected prin-

341; 40 Penn. St.; *Glowinger v. The Franklin Coal Co.*, 5 P. F. Smith, 9; 55 Penn. St.; *Grove v. Hodges*, *Id.* 504; *Funk v. Haldeman*, 53 Penn. St.; 3 P. F. Smith, 229; *Marble Co. v. Ripley*, 10 Wall. 362; *Desloge v. Pearce*, 38 Mo. 602; *B. & W. L. C.*, *supra*.

<sup>1</sup> *Rowbotham v. Wilson*, 3 El. & El. 752; *Curtis v. Daniel*, 10 East, 273; *Barnes v. Mawson*, 1 M. & Sel. 84; 2 Wash. R. P. Bk. 2, Ch. 1, § 3, p. 382; *Moore v. Swan*, 17 Cal. 199; *Boggs v. Merced Co.*, 14 Cal. 279, 375; 3 Kent's Com. 378, b. One seeking to dispute the owner's title must do so by some grant or conveyance. *Ante, idem.* And the mere right to mine would not exclude the surface owner's right to do the same thing. *Bainb.*, p. 308; *Grubb v. Bayard*, 2 Wall. Jr. (N. S.) 81; *Upton v. Brazier*, 17 Iowa, 158; *Caldwell v. Fulton*, 31 Pa. St. 475; *Iron Co. v. Stephens*, 5 Lea (Tenn.), 468; *MacSwinney on Mines*, pp. 26-27 and cases cited.

<sup>2</sup> *Cullen v. Rich*, Bull. N. P. 102; s. c. 2 Str. 1142; *Stewart v. Chadwick*, 8 Clarke (Iowa), 468; *Adam v. Briggs Iron Co.*, 7 Cush. 361; *Bainb.* 4 and 5. A grant of mineral confers the right to work it, without express words to that effect. 15 Am. & Eng. Enc. of Law, 572; *Bainb. on Mines*, 101; *Zinc Co. v. Franklynite Co.*, 13 N. J. Eq. (2 Blos.) 322. But a grantee of mineral is entitled to only so much thereof as he can get without injury to the superincumbent soil. *Coleman v. Chadwick*, 80 Pa. St. 81; s. c. 20 Am. Rep. 93.

ciple in equity jurisprudence that where one has a right, he has all the privileges necessary to a complete enjoyment of that right.<sup>1</sup> The grantee of the minerals is given the right to the minerals under his grant, and as his rights depend upon the terms of the instrument by which they are conveyed, the power to get the minerals is held to be a necessary incident to the grant.<sup>2</sup>

§ 10. **Same — How severance effected.** — The severance between the title to the land and the mineral in place can be made by a deed or conveyance of the ore or mineral under a given tract, and this will make the surface and the minerals distinct hereditaments,<sup>3</sup> and after the title has once been severed a subsequent deed of the surface without excepting the minerals, will not affect the rights of the owner of the minerals.<sup>4</sup> The severance may also result from a lease,<sup>5</sup> or a partition;<sup>6</sup> but a trustee with a power to sell all or any part of a tract, is not authorized to except the minerals.<sup>7</sup>

<sup>1</sup> *Barnes v. Morrison*, 1 Maule & Sel. 77; *Desloge v. Pearce*, 38 Mo. 589. However, this right is subject to the rule: "*Sic utere tuo ut alienum non laedas*," which prevents injury to the surface owner. *Smart v. Morton*, 30 Eng. Law & Eq. 385; *Marvin v. Brewster Iron Co.*, 55 N. Y. (10 Sick.) 538; s. c. 14 Am. Rep. 322; *Horner v. Watson*, 79 Pa. St. 242; s. c. 21 Am. Rep. 55; *Coleman v. Chadwick*, *supra*; *Ryckman v. Gillis*, 57 N. Y. (12 Sick.) 68; s. c. 15 Am. Rep. 464.

<sup>2</sup> *Ante, idem.* *Walt's Act. & Def.* (Vol. 4), p. 422. So long as oil is in the earth in place, it is a part of the real estate, the same as other mineral, but when it reaches the surface, or is taken into possession, it is personalty. *Kelly v. Ohio Oil Co.*, 57 Ohio St. 817; 39 L. R. A. 765; *Williamson v. Jones*, 43 W. Va. 562; 38 L. R. A. 694.

<sup>3</sup> *Armstrong v. Caldwell*, 53 Pa. St. 284; *Caldwell v. Tuldou*, 31 Id. 474; *Hartwell v. Camman*, 2 Stock. (N. J.) Ch. 128; *McMahan v. Berton*, 2 Allen (New Bruns.), 821.

<sup>4</sup> *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538; 14 Amer. Rep. 322. But see, *contra*, *Snoddy v. Bolen*, 123 Mo. 479.

<sup>5</sup> *Maseot v. Moses*, 3 S. Car. 168; 16 Amer. Rep. 697.

<sup>6</sup> *Jones v. Wagner*, 13 Mor. Min. Rep. 690.

<sup>7</sup> *Buckley v. Howell*, 13 M. M. R. 245.

Whether a severance was, or was not, intended by a given contract or conveyance can be shown by parol evidence, in case of doubt,<sup>1</sup> and if a severance is established, the owner of either estate is bound to respect the rights of the other.<sup>2</sup>

§ 11. **Property in mines in reversion.** — It has been heretofore seen that minerals in place are real estate and mines, unless excepted, pass as a portion of the land. The law of real property is also, therefore, applied to mines and minerals, as a separate hereditament, and while the lessee for years is entitled to the possession of a particular mine or quarry during his tenancy, the right of property thereto would be vested in the reversioner, as in the case of other species of real property,<sup>3</sup> and this is equally true of the minerals in place.<sup>4</sup> This rule of law applies as well to an estate for life as to one for years, and prior to their severance the right of property to the mines or mineral in place is in the reversioner, subject to the tenant's possession.<sup>5</sup> As to minerals removed, however, by the tenant, during his tenancy, the right of property would be added to his right of possession,<sup>6</sup> but such

<sup>1</sup> *Stewart v. Chadwick*, 13 M. M. R. 236

<sup>2</sup> *Williamson v. Gibson*, 16 M. M. R. 243. This applies as well to the surface owner's right of support (*Jones v. Wagner, supra*) as the mineral owner's right of ingress and egress (*Williamson v. Gibson, supra*).

<sup>3</sup> *MacSwinney on Mines*, p. 33; *Keyes v. Powell*, 2 E. & B. 132.

<sup>4</sup> *Davis v. Marlborough*, 2 Swanst. 147; *Atterson v. Stevens*, 1 Taunt. 193, 199; *Astry v. Ballard*, 2 Nish, 193. But it is not waste for the lessee of land, with the mines, to open a new mine. *Dorcy v. Askwith*, Hob. 284; s. c. Hutt, 19.

<sup>5</sup> *Davis v. Marlborough, supra*; *Dal v. Powell*, 8 Scott N. R. 693; but see *Saunders' Cas.*, 5 Co. R. 12; *Harley v. Lehigh Co.*, 35 Pa. St. 287.

<sup>6</sup> The presumption that the party having the possession of the surface also has possession of the minerals does not apply after a severance.

as remained unworked, on the expiration of his tenancy, would devolve on the reversioner.<sup>1</sup>

§ 12. **Same — Shaft, drift, and containing chamber.** — The rights of property in a mine attach as well to the shaft, drift or chamber, caused by the working of the mine, as to the mineral itself. The shaft, drift and space caused by the removal of the ore and waste, is as much the property of the reversioner, as the surface of the soil,<sup>2</sup> but during the tenancy for life or years the tenant would be entitled to possession.<sup>3</sup> A conveyance of land, excepting the mines and minerals, will also be held to except to the grantor the shaft and space containing the mineral, with all the rights of property therein,<sup>4</sup> but if such grant were also subject to a lease, the right of possession in such space would be in the lessee; and the grantor, although having the property in, would be postponed in the enjoyment of same until the termination of the particular estate.<sup>5</sup>

§ 13. **Mineral under streets and highways.** — The right to the mineral deposits located under streets and highways is an apparent exception to the rule that the surface owner is entitled to all subjacent strata of minerals, for, in such case, although the public has the exclusive right to the surface, the owner of the adjacent land, on either side of the street, owns the mineral beneath.<sup>6</sup> And this is true

*Armstrong v. Caldwell*, 53 Pa. St. 284; *Raine v. Alderson*, 1 Arnold, 329; *Smith v. Lloyd*, 9 Ex. 502.

<sup>1</sup> *Keyes v. Powell*, 2 E. & B. 144; *Earsley v. Granville*, 3 Ch. D. 826; *Lewis v. Braithwaite*, 2 B. & Ad. 487; *Cockrell v. Chambley*, 10 B. & C. 572.

<sup>2</sup> *Keyes v. Powell*, *supra*; *Eardley v. Granville*, 3 Ch. D. 826.

<sup>3</sup> *Lewis v. Braithwaite*, 2 B. & Ad. 487; *MacSwinney*, pp. 33, 35, and Chap. XI.

<sup>4</sup> *MacSwinney*, p. 35; *Eardley v. Granville*, 3 Ch. D. 833.

<sup>5</sup> *Ante. Idem*; *MacSwinney*, p. 33.

<sup>6</sup> *Goodtitle v. Altker*, 1 Burr. 143; 1 Rolle's Abr. 392; B. 1 and 2; *Lode*

whether the road or street is a public or private way;<sup>1</sup> the adjacent owner is, *prima facie*, the owner of the mineral beneath the way.<sup>2</sup> But this is only true where the grant, dedication or legislative act vests but an easement to the surface in the public,<sup>3</sup> for if the fee to the land covered by such road or street is conveyed to the public, then the minerals beneath would go with the fee and the adjacent owner would have no rights therein.<sup>4</sup> And even where the public takes but an easement in the highway and the adjacent owner is entitled to the mineral in place, the ore cannot be removed to the injury of the public in its surface rights.<sup>5</sup>

*v. Shepard*, 2 Str. 1004; *Waddell v. Buchen*, 6 Sess. Cas. (3d Ser.) 690; *MacSwinney*, p. 28 *et sub.*; *Bar. & Adams on Min.*, p. 183 *et sub.* The proprietor of land over which a turnpike passes, retains an exclusive right to all mineral springs and quarries beneath. *Kelly v. Donahoe*, 2 Metc. (Ky.) 482. This is especially true if the dedication is for street purposes only. *Dubuque v. Benson*, 28 Iowa, 248; *Smith v. Rowe*, 19 Ga. 89; *s. c.* 7 Mor. Min. Rep. 306. See also as to road located by condemnation, *Robertson v. Smith*, 7 M. M. R. 196.

<sup>1</sup> *Bar. and Adams on Mines*, p. 183; *Holmes v. Bellingham*, 7 C. B. (N. S.) 329; *MacSwinney on Mines*, p. 28 *et sub.*; *Selden v. Smith*, 86 L. T. (N. S.) 168, 169. The title to ore, by special act in England, is in the adjacent land owner, in such case. *Rolls v. St. George*, 14 Ch. D. 794, *MacSwinney*, p. 20.

<sup>2</sup> Authorities, *supra*. The following cases have passed upon the title to minerals under streets and highways: *Columbus Co. v. Withrow*, 82 Ala. 193; *Union Coal Co. v. LaSalle*, 117 Ill. 411; *Des Moines v. Hall*, 24 Iowa, 236; *Tousley v. Galena Min. Co.*, 24 Kan. 328; *Diedrich v. N. W. Co.*, 42 Wis. 260; 20 Am. & Eng. Enc. Law (2 Ed.), 684 *et sub.*

<sup>3</sup> *Des Moines v. Hall*, 24 Iowa, 235, where the statute vested the fee simple in the city. See *Dubuque v. Benson*, *supra*; *Matthieson & Hegeler Zinc Co. v. LaSalle*, 117 Ill. 411.

<sup>4</sup> *Homesville v. Homes*, 7 M. M. R. 193; *s. c.* 6 Bush (Ky.), 233; *Stokey v. Robbatown Bd. Co.*, 5 Watts 546. As to claim on the public domain, see *Robertson v. Smith*, 1 Mont. 410; *Friend v. Porter*, 50 Mo. App. 89; *Snoddy v. Bolen*, 122 Mo. 479; *Bundy v. Cato*, 61 Ill. App. 209.

<sup>5</sup> Where the fee is in the city it can bring trespass against any one removing minerals. *Union Coal Co. v. LaSalle*, 136 Ill. 119. See, also, for cases where the ownership of minerals was held in public: *Tonsley v. Galena M. & S. Co.*, 24 Kan. 328; *St. Anthony Falls Co. v. King Bridge*

§ 14. **Mineral deposits under railroads.** — The title to mineral under railroad rights of way is governed substantially by the same rules that obtain in the case of such deposits under roads and highways. If the right of way simply is acquired, whether by voluntary or involuntary alienation, the title to the minerals remains in the landowner,<sup>1</sup> but if the fee is conveyed to the railroad the minerals are conveyed as a portion of the land.<sup>2</sup> But whether the railroad acquires the fee to its right of way, or only an easement to the surface, its rights and those

Co., 23 Minn. 186. And as to disturbance of public rights by removal of ore, see Bar. & Adams on Mines, p. 183.

<sup>1</sup> *Hasson v. Oil Co.*, 12 M. M. R. 547. And it has been held that a railroad cannot claim the right of surface support, where it has but an easement, unless it will purchase the minerals. *Fletcher v. G. W. Ry. Co.*, 12 M. M. R. 521. But the weight of authority is perhaps to the contrary. *Caledonia R. Co. v. Sprat*, 2 MacQueen, 8. C. App. 449. Even where the mineral is reserved. *Rex v. Leeds & Selby R. Co.*, 8 A. & E. 686. But where an easement only is granted, the authorities all hold that the title to ore remains in the landowner. Bar. & Adams, p. 186 *et sub.*; MacSwinney, p. 29, *et sub.*; *G. W. R. Co. v. Bennett*, L. R. 2 H. L. 88; *Dixon v. Cal. &c. Co.*, 5 App. Cas. 829; *Smith v. Holloway*, 124 Ind. 329; *Evans v. Haefner*, 20 Mo. 141; *Lyon v. Gormley*, 53 Pa. 261; *Stokey v. Bridge Co.*, 5 Watts, 546. This is also the rule in England, under Ry. Cl. Con. Act, 1845; MacSwinney, p. 29, *et sub.*

<sup>2</sup> *Brader v. Natoma W. Co.*, 50 Cal. 621; *Doran v. Cent. Pac. Ry. Co.*, 24 Cal. 245. As to effect on coal mine of land condemned in Missouri, see *Chicago, Santa Fe & Cal. Ry. Co. v. McGrew*, 104 Mo. 282. Title by eminent domain does not convey the fee. *Searle v. Railroad*, 33 Pa. 57; *Pa. Gas Coal Co. v. Fuel Co.*, 131 Pa. 522. But where the fee is conveyed, see case of Mines, Plowd. 336; *Hodgson v. Fletcher*, 3 Dougl. 33; *Curtis v. Daniel*, 10 East, 274; *Marshall v. Ulleswater Co.*, 8 B. & S. 748; *Egremont Road v. Egremont Co.*, 14 Ch. D. 160. As to power of railroad, in England, to purchase land and take title to the minerals, see MacSwinney, Chap. VII, pt. A, Sec. 6, and cases cited. And where simply an easement is acquired, the company can remove all mineral necessary to construct its roadbed. *Evans v. Haefner*, 29 Mo. 141. A railroad right of way, upon public land, is not subject to location, as mineral land. *Erhard v. Bosoro*, 118 U. S. 537; *Smith v. North Pac. Co.*, 58 Fed. Rep. 518; *Wilkinson v. North Pac. Co.*, 5 Mont. 538; *Robbins v. Milwaukee &c. Co.*, 6 Wis. 636; 20 Am. & Eng. Enc. Law (2 Ed.), p. 691.



of the public are protected in the enjoyment of its right of way and the minerals cannot be removed to the injury of such surface rights.<sup>1</sup>

§ 15. **Minerals under rivers and seas.** — In the case of navigable rivers, since the title is in the State or government, to the bed of the stream, the title to underlying minerals is also in the State or government.<sup>2</sup> And the same rule obtains as to mineral lying under the seashore, or the coast, between high and low water mark,<sup>3</sup> but, in the case of non-navigable streams, since the adjoining owner's title extends to the center of the stream, the minerals beneath belong to such adjoining owners.<sup>4</sup> But the title to minerals underlying navigable rivers and the seashore can be acquired by grant from the State or general government,<sup>5</sup> the same as the minerals under non-

<sup>1</sup> *Smith v. Holloway*, 124 Ind. 329; *Brown v. Carey*, 43 Pa. 495. Injunctions will issue to protect such right. *Lawrence App.*, 78 Pa. 365; *Davis v. Jefferson Gas Co.*, 147 Pa. 180; *N. E. R. R. Co. v. Elliott*, 80 L. J. Ch. 160; *Same v. Crossland*, 82 L. J. Ch. 353. And the rule is the same in case of an express reservation of the mineral. *Caledonia R. Co. v. Sprat*, 2 McQueen, S. C. App. 449; *Same v. Belhaven*, 3 *Id.* 56; *Rex v. Leeds and Selby R. R. Co.*, 3 A. & E. 686. But see cases holding *contra* that if company does not purchase the mineral it is not entitled to support. *Bagnall v. London & N. W. Ry. Co.*, 1 H. & C. 544; *Fletcher v. G. W. Ry. Co.*, 12 M. M. R. 521. This subject is regulated in the West by special acts. *St. Nev.* 1885, Sec. 387. Injunction will lie to prevent removal of mineral from under a railroad right of way, if the removal of same threatens to result in the subsidence of the track. *C. & A. R. R. Co. v. Brandau*, 81 Mo. App. 1.

<sup>2</sup> *Coosaw Min. Co. v. So. Car.*, 47 Fed. Rep. 225; *State v. Phosphate Co.*, 32 Fla. 82; *State v. Guano Co.*, 22 So. Car. 50; *Gilchrist's App.*, 109 Pa. 600; *Poor v. McClure*, 77 Pa. St. 214; *Braxton v. Bressler*, 64 Ill. 488; *Bar. & Adams on Mines*, pp. 172, 180.

<sup>3</sup> *People ex rel. Dead Whale Mineral Co. v. Morrill*, 26 Cal. 336. But the mineral so located is subject to location or purchase. *Idem. Atty.-Gen. v. Hammer*, 27 L. J. Ch. 837; *Moore v. Massini*, 37 Cal. 432.

<sup>4</sup> *Hole, de Jur Moris*, Chap. I.; *Wishart v. Wyllis*, 1 Macq. 389; *Brickett v. Morris*, L. R. 1 S. C. & Div. 47; *MacSwinney*, p. 30.

<sup>5</sup> *MacSwinney*, p. 31; *Bar. & Adams*, p. 180.

navigable streams can be conveyed by the private owner,<sup>1</sup> and a grant of the seashore,<sup>2</sup> or river bank,<sup>3</sup> in the absence of a reservation of the minerals would be construed to convey the minerals also.<sup>4</sup>

§ 16. **Nature of property in oil.** — The branch of the law that treats of the property in mineral oil and other mineral fluids is of great practical importance in view of the modern commercial value of such products. Like water, oil is so far a free, natural agent, that the right of property cannot be said to attach, except when the mineral is in place or when it has been confined for commercial uses.<sup>5</sup> Oil in place, however, like other mineral, is a part of the land, with all the attributes of property of which the soil is capable.<sup>6</sup> A lease of an oil well for a term of years has been held to be an estate for years to the same extent as a lease of the land for a corresponding period,<sup>7</sup> and such a lessee is entitled to a notice in parti-

<sup>1</sup> Bates, 34 L. J. Ch. 406; *Hamilton v. Graham*, L. R. 2 S. C. and D. 166; *Ramsey v. Blair*, 1 App. Cas. 701.

<sup>2</sup> *Atty.-Gen. v. Hammer*, 27 L. J. Ch. 837, where coal mines between high and low-water mark were held to be conveyed, although not expressly granted by the crown.

<sup>3</sup> *Braxton v. Bressler*, 13 Mor. Min. Rep. 163; *Brandt v. McKeener*, 9 M. M. R. 216.

<sup>4</sup> *Idem.* See, as to minerals between high and ordinary water mark, *MacSwinney*, p. 81.

<sup>5</sup> *Kier v. Peterson*, 41 Pa. 361; *Gill v. Weston*, 110 Pa. 313. But see *Dunham v. Kirkpatrick*, 101 Pa. 43; 47 Am. Rep. 696.

<sup>6</sup> *Gill v. Weston*, 110 Pa. 313. A suit by a co-tenant for accounting must be brought in the county where the land lies. *Thompson v. Noble*, 3 Pitts. 201. An oil lease has been held partnership assets. *Brown v. Beecher*, 120 Pa. 590; *Chamberlain v. Dow*, 16 W. N. C. 532. Until oil or gas are reduced to possession, owner of surface acquires no property therein. *Ohio Oil Co. v. Indiana* (1900), 177 U. S. 190; *Brown v. Spillman*, 155 U. S. 669; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; *Jones v. Forest Oil Co.*, 194 Pa. St. 379.

<sup>7</sup> *Duke v. Hague*, 107 Pa. 57.

tion the same as the owner of the fee would be.<sup>1</sup> The right of property in such mineral is so far dependent on the natural laws governing such fluids, however, as to make some peculiar legal distinctions in the rights of the owner of land containing oil, as compared with the rule of ownership in other minerals than fluids.<sup>2</sup> Accordingly it has been held that a lessee is not liable for the appropriation of oil that came, according to natural laws, into a mine he was in the lawful possession of,<sup>3</sup> for in such case the law of property would be so far governed by the natural law of the mineral as to limit the ownership of the oil to such cases where it was practically possible and when it would not interfere with other vested rights.<sup>4</sup> But

<sup>1</sup> *Idem.* The owner of an oil lease is entitled to have his property rights protected the same as the owner of the surface. *Stoughton's App.*, 88 Pa. 198.

<sup>2</sup> *Kier v. Peterson, supra.* As a result of the qualified ownership in oil and gas, resulting from the nature of the mineral itself, although the courts of Tennessee hold that the title thereto may be distinct from the surface (*Murray v. Allard*, 43 S. W. Rep. 355), the weight of authority is perhaps to the effect that the title to oil and gas in place cannot be distinct from that to the surface. *Funk v. Holdman*, 53 Pa. St. 229; *Brown v. Spillman*, 155 U. S. 665; *Barnhart v. Lockwood*, 152 Pa. St. 82; 48 Cent. Law. Jour. 470, Art. Geo. S. Dix, where it is said: "He cannot deliver the possession or even the right of possession of the gas which to-day is under his land, because by the time the buyer reaches it, it may be gone. He cannot convey anything which he is not capable of delivering the possession, or the present or future right of possession of." And as aptly said by the Supreme Court of Indiana: "A grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie." *People's Gas Co. v. Tyner*, 181 Ind. 277, cited and approved in *Ohio Oil Co. v. Indiana*, 177 U. S. 208. See, also, *Detlor v. Holland*, 57 Ohio St. 492; 40 L. R. A. 266; 49 N. E. Rep. 690. But see late case of *Lawson v. Kirchner*, where it is held that an oil or gas lease is a sale of an interest in the real estate, conditional upon the discovery and reduction of the mineral to the lessee's possession. 50 West Virginia, 844; 40 S. E. Rep. 844.

<sup>3</sup> *Kier v. Peterson*, 41 Pa. 361. But see *Dunham v. Kirkpatrick*, 101 Pa. 43; 47 Am. Rep. 696.

<sup>4</sup> See note to *Williamson v. Jones*, 25 L. R. A. 223 (West Va.). A

were such lessee or adjoining landowner to use other than lawful means to appropriate the mineral oil from the land of the owner they would be liable, in an appropriate action, for the right of property attaches to the oil in place and the owner is as much entitled to protection of his property rights as the owner of other species of property.<sup>1</sup>

§ 17. *Same — Natural gas.* — The right of property in natural gas, is a distinctively American and practically recent branch of the law, equally as important as that pertaining to mineral oil, to which it bears such close resemblance.<sup>2</sup> Natural gas is as much an article of commerce today as zinc, iron and other mineral products,<sup>3</sup> but in the very nature of things this is so in a limited sense, for like oil and water, gas only becomes a commodity when the natural laws governing the mineral are overcome. Like petroleum, while in place, gas is a part of the realty, passing by a conveyance of the land or capable of a separate ownership; <sup>4</sup> it is a part and parcel of the inheritance, while in place; will descend with the soil to heirs or reversioners, and its wrongful appropriation would authorize the owner of the remainder to an injunction.<sup>5</sup> But, unlike other minerals, gas has the power and tendency of escaping without the will of the owner; in this respect it has been

grant of the coal in the land does not convey the oil or gas therein, but it passes with the surface. *Chartiers' Block Coal Co. v. Mellon*, 152 Pa. St. 286; *Rend v. Oil Co.*, 48 Fed. Rep. 248.

<sup>1</sup> *Gill v. Weston*, 110 Pa. 813; *Thompson v. Noble*, 8 Pitts. 201. In Indiana no title to oil or natural gas is acquired by the landowner, until the same is reduced to his possession. *Ohio Oil Co. v. Indiana*, 177 U. S. 190.

<sup>2</sup> See note to *Williamson v. Jones* (W. Va.), 25 L. R. A. 222.

<sup>3</sup> *State v. Indiana Oil & Gas Co.*, 6 L. R. A. 579; s. c. 130 Ind. 575.

<sup>4</sup> *Williamson v. Jones*, *supra*.

<sup>5</sup> *Williamson v. Jones*, *supra*. This is the proposition established in this case.

likened to those animals *ferae naturae*,<sup>1</sup> but it is more properly compared to the water, air and other natural elements, devoid of animal life, that are free by nature, but which may, when adapted to commercial uses, have the attribute of property.<sup>2</sup> Accordingly it has been held that the property in gas only attaches so long as the mineral is in or on the land of an owner, but when it escapes and comes into the land of another the former's title is gone,<sup>3</sup> and the landowner conducting mining operations is not liable to an adjoining landowner because of escaping gas, if the means used are lawful, and the owner of the gas would not be permitted to interrupt such mining to recover the gas,<sup>4</sup> but otherwise if the gas is wrongly appropriated.<sup>5</sup>

§ 18. **Minerals claimed adversely.** — It is an undisputed principle in the law of real property, that mere possession of such property, after a certain length of time, will vest sufficient title in the person who has such possession as to enable him to hold the land as against all the world, except the true owner.<sup>6</sup> There are different theories extant

<sup>1</sup> *Westmorland & Cambria Nat. Gas Co. v. DeWitt*, 5 L. R. A. 731; s. c. 130 Pa. 235; *Brown v. Vandergriff*, 80 Pa. 147; *Ont. Nat. Gas Co. v. Gosfield*, 18 Cent. App. 626.

<sup>2</sup> See Blackstone's Com. for classification of the property referred to and to which gas is most likened in the author's view.

<sup>3</sup> *Westmorland &c. v. DeWitt*, 5 L. R. A. 731; 130 Pa. 235; *Brown v. Vandergriff*, 80 Pa. 147. So it has been held a lessee of an oil well can appropriate gas coming into the well. *Wood Co. Pet. Co. v. W. Va. Trans. Co.*, 28 W. Va. 210; 57 Am. Rep. 659; see also *Truby v. Palmer*, 4 Cent. Rep. 929; *Palmer v. Allen*, 26 W. N. C. 514.

<sup>4</sup> *People's Gas Co. v. Tyner*, 81 Ind. 277; 16 L. R. A. 443; *Hague v. Wheeler*, 137 Pa. 324; 22 L. R. A. 141.

<sup>5</sup> *Williamson v. Jones*, 25 L. R. A. 222 and cases cited. For interesting article on nature of property in oil and gas, see 48 Cent. Law Jour. 470.

<sup>6</sup> *Tiedeman on R. P.*, §§ 692-693; *Washb. on R. P.* 114; 2 *Sharsw. Bla. Com.* 196 and note.

as to the ultimate effect of the statute of limitations,<sup>1</sup> but the above proposition is admitted by all authorities.<sup>2</sup> The possession of the adverse claimant, however, in order to vest in him a title to the land must be independent of the true owner,<sup>3</sup> and as the title of the owner is supposed to carry with it the right of possession,<sup>4</sup> in order to have his title prevail as against the real owner of the land, the adverse claimant must show, by competent evidence, the superiority of his claims.<sup>5</sup> When minerals are claimed adversely, if the owner of the surface has a freehold estate in the land, the title to the minerals must be clearly established in the adverse claimant,<sup>6</sup> and if the title to the minerals has never been severed from the title to the surface of the land, although the title to the minerals may be made out, in the absence of better evidence, by proof of acts of ownership and length of possession,<sup>7</sup> mere reputation of ownership is not sufficient to rebut the presumption of title to the minerals in favor of the owner of the surface,<sup>8</sup> unless

<sup>1</sup> Tiede. on R. P. § 717 and cases cited; Ang. on Lim., Secs. 1, 7; 8 Washb. on R. P. 146; *Davenport v. Tyrel*, 1 W. Bl. 975; *McElmoyne v. Cohen*, 13 Pet. 312; *Townsend v. Jamison*, 29 How. 407; *Bulger v. Rock*, 11 Pick. 36; *Blair v. Smith*, 16 Mo. 278; *Moore v. Luce*, 29 Pa. St. 202; *Bliss C. P.*, § 356.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> As to the requisites of an adverse possession see Tiede. on R. P. § 697 *et sub.*

<sup>4</sup> Tiede. R. P., § 693; 2 Prest. Abst. 286, 290; 4 Kent's Com. 482; *Barr v. Gratz*, 4 Wheat. 218; *Cadman v. Winslow*, 10 Mass. 146; *Brimner v. Long Wharf*, 5 Pick. 131; *Stevens v. Holliter*, 18 Vt. 294; *Smith v. Burtis*, 6 Johns. 216; *Whittington v. Wright*, 9 Ga. 23.

<sup>5</sup> Tiede. R. P., § 904 *et sub.*; *Wait's Act. & Def.* (Vol. 4), p. 422; *Bainb. on Mines*, p. 5; *Stewart v. Chadwick*, 8 Clarke (Iowa), 468; *Coll. on Mines*, p. 21, § 17; *Curtis v. Daniel*, 10 East, 273.

<sup>6</sup> *Ante, idem*; *Bainb. on Mines*, p. 5; *Desloge v. Pearce*, 38 Mo. 588; *Stewart v. Chadwick*, 8 Clarke (Iowa), 468.

<sup>7</sup> 74 Law Lib.; *Coll. on Mines*, p. 21; *Bainb.* 28; *Curtis v. Daniel*, 10 East, 273; *McGarrity v. Byington*, 12 Cal. 427.

<sup>8</sup> *Barnes v. Mowson*, 1 Maule & Sel. 77; *Desloge v. Pearce, supra*; *Rogers v. Brenton*, 10 Q. B. 26; *Coll. on Mines*, pp. 22-41.

accompanied with a uniform usage of the right based upon clear and undisputed evidence of the exercise of such ownership.<sup>1</sup>

§ 18a. **Same — When minerals have been conveyed.** — The above rules apply in the establishment of an adverse claim to minerals before the title to the minerals has been severed from the title to the surface of the soil. In such case the burden of proof is upon the party endeavoring to assert his adverse claim of title to the minerals and he must show by clear and cogent proof, facts sufficient to establish the usage and exercise of the right of ownership over the minerals or other similar evidence to prove his claim of title to the minerals.<sup>2</sup> This may either be done by showing acts of the surface owner by which he would be estopped from denying the title of the adverse claimant, or by showing that the possession and exercise of the rights of ownership by the adverse claimant has been continued and uninterrupted during the entire period of the statute of limitations.<sup>3</sup> But where there has once been a severance of the title to the minerals from the title to the surface, the presumption of ownership in the minerals no longer exists in favor of the party in possession of the surface,<sup>4</sup> but, on the contrary, the ownership of the

<sup>1</sup> *Ante, idem.*

<sup>2</sup> *Ante, idem.*

<sup>3</sup> Tiede. R. P., Sec. 707 and cases cited; Copp's Min. Lands, §§ 408-425-424; The 420 Bullion Min. Co., 9 Nev. 240; Bullion M. Co. v. Croesus G. & S. Min. Co., 2 Nev. 168; Calvin v. McCune, 89 Iowa, 502; Ege v. Medlar, 82 Pa. St. 86; Alken v. Buck, 1 Wend. 467; Ewing v. Burnett, 11 Peters, 41; Jackson v. Oltz, 8 Wend. 440.

<sup>4</sup> There should be possession of the mine or mineral strata, as such. Caldwell v. Copeland, 87 Pa. St. 427; Arnold v. Stevens, 24 Pick. 106; Waits' A. & D., pp. 422-423; Wilson v. Cleveland, 30 Cal. 192; Richardson v. McNulty, 24 Cal. 339; B & W. L. C., pp. 224-225; Armstrong v. Caldwell, 63 Pa. St. 284; West v. Lanier, 9 Humph. (Tenn.) 762.

minerals is supposed to follow the title to the same,<sup>1</sup> and in the absence of proof of the possession of the mineral strata, evidence of the possession of the surface will not avail to establish a title by adverse possession to the minerals.<sup>2</sup>

<sup>1</sup> Rowbotham v. Wilson, 3 El. & El. 752.

<sup>2</sup> Hodgkinson v. Fletcher, 3 Doug. 81; Armstrong v. Caldwell, 68 Pa. St. 284; Livingston v. Peru Iron Co., 9 Wend. 518; s. c. 2 Paige Ch. 390. "When ore has been, from time to time, taken generally from the lands of a large estate, without reference to any particular tract or the subdivisions of the land, the right of the dispossessor so taking the ore cannot be carried beyond his mere *pedis possessio*." Ege v. Medlar, 82 Pa. St. 86; M. M. D. 6.



## CHAPTER III.

### THE DIFFERENT ESTATES IN MINES.

**SECTION 19.** Where landowner has the fee.

- 20. Infant or lunatic the owner.
- 21. Owned by tenant in tail.
- 22. Tenant for life or years.
- 23. Tenant by dowry.
- 24. Tenants in common.
- 25. Reversioner or remaindermen.

§ 19. Where landowner has the fee. — Since minerals in place are a part of the realty, the tenant in fee has the absolute right of property in the mines and quarries beneath the surface,<sup>1</sup> after entry into rightful possession, and he may take the minerals and stone at will,<sup>2</sup> or commit such similar acts as would, on the part of strangers or tenants, amount to legal waste or trespass.<sup>3</sup> As between himself and his successors in title the owner of the fee has the right to work all mines and quarries beneath and within his land and the produce therefrom may be disposed of at his pleasure.<sup>4</sup> And the rule is the same, although the land may be subject to an executory devise, for as to all such acts on the part of the tenant in fee, in possession there is, *prima facie*, no legal liability for waste.<sup>5</sup> But while this is the general rule and would seem to be subject to no exception, there is an old English case which notes an exception, in the case where the settlor of the devise has, by express

<sup>1</sup> *A. G. v. Marlborough*, 8 Madd. 537; *Buckley v. Howell*, 29 Beav. 555; *MacSwinney on Mines*, p. 64.

<sup>2</sup> *Ante, idem*; *Dickin v. Hamar*, 1 Dr. & Sm. 284.

<sup>3</sup> 3 Bl. Com. 223; *Bar. & Adams on Mines*, p. 7.

<sup>4</sup> *MacSwinney on Mines*, pp. 64-65.

<sup>5</sup> *Turner v. Wright*, 2 DeG., F. & J. 234; *Wright v. Atkins*, T. & R. 157; *MacSwinney on Mines*, P. 44.

words, provided for the liability of the tenant in fee, for such acts of waste as the ownership of the land would otherwise exempt the tenant from any liability for.<sup>1</sup>

§ 20. **Same — Infant or lunatic the owner.** — Where land containing minerals is vested in an infant and he is in possession, the law recognizes his right, through his guardian, either to open new mines to obtain the ore, or work the old ones already opened.<sup>2</sup> The rule is, substantially, the same as in the case of other owners in fee, except so far as the infant's right is affected by his disability. But in the case of a lunatic this rule does not apply,<sup>3</sup> although attempted to be applied in an early English case,<sup>4</sup> as the court has no authority to sanction a working of a lunatic's mine, except through a statutory sale or lease thereof.<sup>5</sup> This seems to be true, however beneficial the working of the mine may seem to the estate of the lunatic, as it would be tantamount to a disposition of a portion of his inheritance, and the court has no jurisdiction to direct such disposition,<sup>6</sup> although it may order a sale, lease or partition, under the statute.<sup>7</sup>

§ 21. **Owned by tenant in tail.** — Like the tenant in fee, a tenant in tail in possession, may commit legal and equitable waste and is not liable for the produce converted,<sup>8</sup> although he may not bar the entail.<sup>9</sup> After possi-

<sup>1</sup> *Blake v. Peters*, 10 W. R. 826; *MacSwinney on Mines*, *supra*.

<sup>2</sup> *Lydal v. Clavering, amb.*, 371; *MacSwinney*, pp. 22, 44.

<sup>3</sup> *MacSwinney*, p. 44; *Re Smith*, 10 Ch. 85.

<sup>4</sup> *Ex parte Tabbert*, 6 Ves. 428.

<sup>5</sup> *MacSwinney*, p. 44; Chap. VIII, Sec. 1.

<sup>6</sup> *In re Smith*, 10 Ch. 86; *MacSwinney on Mines*, p. 45; but see *Oxenden v. Compton*, 2 Ves. J. 73.

<sup>7</sup> *MacSwinney*, p. 127, and cases cited; *Rowlands v. Evans*, 31 J. L. Ch. 265.

<sup>8</sup> *A. G. v. Marlborough*, 3 Mod. 531; 2 Bl. Com. 115.

<sup>9</sup> *Co. Litt.* 224a; *Jerves v. Bruton*, 2 Vern, 251; *MacSwinney*, p. 45.

bility of issue is extinct, a tenant in tail occupies the same relation, with reference to the inheritance, as a tenant for life, without impeachment for waste,<sup>1</sup> and may, generally, work all opened mines and quarries.<sup>2</sup> But the right to commit such waste would not be recognized to the extent of permitting a mansion-house on the estate to be undermined and ruined but would be restricted so as to prevent any such injury.<sup>3</sup> And the rule in regard to a working by an infant or lunatic tenant in tail would be the same applied where they are the owners of the fee, and the former could work, by his guardian, while the latter could not.<sup>4</sup>

§ 22. *Tenant for life or years.* — Generally, a tenant for life or for years either, as between himself and the remainder-man, has the right to work all open mines<sup>5</sup> and quarries,<sup>6</sup> and after a severance from the soil he will be regarded as the owner of the minerals.<sup>7</sup> Where the estate vests under the terms of a will, the right to mine is not dependent upon the qualification of the trustee or administrator, but inures to the tenant on the vesting of the estate,<sup>8</sup> and if there had been a working of the estate prior to the entry of the tenant for life or years, the burden would be on the remainder-man to show

<sup>1</sup> *Williams v. Williams*, 15 Ves. 427; *Turner v. Wright*, 2 DeG., F. & J. 247. But see *Abraholl v. Bubb*, 2 Swanst. 173.

<sup>2</sup> *Lynn's App.*, 31 Pa. St. 44; *Reed v. Reed*, 16 N. J. Ch. 248.

<sup>3</sup> *A. G. v. Marlborough*, 3 Madd. 539, which announces this principle. *MacSwinney*, p. 45.

<sup>4</sup> *Clavering v. Clavering*, Mosely, 223; *Lydal v. Clavering*, *amb.*, 371 n.

<sup>5</sup> *Kier v. Olterson*, 41 Penn. 361; *Neele v. Neele*, 19 Pa. St. 323; *MacSwinney*, p. 46; *Bar. & Adams*, p. 16.

<sup>6</sup> *Tucker v. Linger*, 21 Ch. D. 27.

<sup>7</sup> *McKee v. Brooks*, 20 Mo. 526 (1855); *Bagot v. Bagot*, 32 Beav. 516; *MacSwinney*, p. 46.

<sup>8</sup> *Thursby v. Thursby*, 19 Eq. 413.

that it was not sufficient to constitute an open mine.<sup>1</sup> And where the mines have been opened prior to his entry, the tenant for life may even work the mine to exhaustion;<sup>2</sup> is entitled to the rents or royalties on all leases made by him, or by the exercise of a power given by his testator or deviser,<sup>3</sup> and to the proceeds of royalties on new seams or veins opened by a tenant under lease from his settlor.<sup>4</sup> In many of the United States the privileges and presumptions obtaining in favor of the life tenant are more liberal than at common law,<sup>5</sup> although the common law doctrine is preserved in many States.<sup>6</sup> But since mining is a permanent injury to the inheritance and a tenant for life or years is not permitted to commit such waste, they are not entitled to work mines or quarries not opened before the commencement of their estate,<sup>7</sup> and a tenant committing such waste is liable to account to the reversioner.<sup>8</sup> It would seem, on principle, when a working prior to the entry of the tenant was disputed, the affirmative being with the tenant, that the onus of proof would be on him, and such is the English rule;<sup>9</sup> but a different rule has been an-

<sup>1</sup> *Ellis v. Snowdon and C. Co.*, 4 App. Cas. 454. But see *Bartlett v. Phillips*, 4 DeG. & J. 461. As to open oil or gas wells, life-tenant has the same right to work as if tenant without impeachment for waste. In re Chaytor's Set., 69 L. J. Ch. 887; 2 Ch. 804 (1900); G. D. U. S., Vol. 12, p. 2571.

<sup>2</sup> *Koen v. Bartlett*, 41 W. Va. 559.

<sup>3</sup> *Daly v. Beckett*, 24 Beav. 114; *Cowley v. Wellesley*, 35 *Idem*, 638.

<sup>4</sup> *Spencer v. Scurr*, 31 Beav. 334.

<sup>5</sup> *Lynn's Appeal*, 31 Pa. St. 44; *Billings v. Taylor*, 10 Pick. (Mass.) 460.

<sup>6</sup> *Harlow v. Lake Superior Co.*, 36 Mich. 105; *Franklyn Co. v. McMillan*, 49 Md. 349; *Bar. & Adams on Mines*, 9, 17.

<sup>7</sup> *Viner v. Vaughan*, 2 Beav. 466. A tenant for life or years cannot conduct operations for oil or gas, unless wells were opened before he came into possession. *Marshall v. Mellen*, 170 Pa. St. 371; *Williamson v. Jones*, 39 W. Va. 256.

<sup>8</sup> *Griffin v. Fellows*, 87½ Pa. 114.

<sup>9</sup> *Bartlett v. Phillips*, 4 DeG. and J. 421; *Ellis v. Snowdon*, 4 App. Cas. 461; *MacSwinney*, p. 47.

nounced in Pennsylvania, where it is said that the presumption was in favor of the life tenant until the contrary was established by the reversioner.<sup>1</sup> Of course the *prima facie* right of the tenant against the reversioner may be expressly negated by the settlor.<sup>2</sup>

§ 23. *Tenant by dower.* — A tenant by dower has the same right to work opened mines that the life tenant has, and the same rules apply.<sup>3</sup> If the dower has been actually assigned and contains open mines, the widow has the right to work them, even to exhaustion.<sup>4</sup> And even before an assignment of dower she would be entitled to one-third of the proceeds of the sale of minerals, extracted from opened mines or quarries,<sup>5</sup> or the royalties payable thereunder if mined under a lease.<sup>6</sup> In Illinois it has been held the widow may work mines located on the land in which she is entitled to dower, opened after the death of her husband and before the assignment of her dower, since the mine was an open mine at the date of the vesting of her estate.<sup>7</sup> The assignment may either be collectively, with other lands, or the mine set off, separately, by itself; described, if collectively, by metes and bounds; or a proportion of the profits or alternate possession and enjoyment of the mine, whichever, under the circumstances of

<sup>1</sup> *Lynn's Appeal*, 31 Pa. St. 44.

<sup>2</sup> *Ferrand v. Wilson*, 15 L. J. Ch. 41, 54.

<sup>3</sup> *Stoughton v. Leigh*, 1 Taunt. 402; *MacSwinnney*, p. 48; *Clift v. Clift* (Tenn.), 3 Pick. 17; *Moore v. Rollins*, 45 Maine, 493.

<sup>4</sup> *Westmorland Co's. Appeal*, 85 Penn. 344; *Shoemaker's Appeal*, 106 Penn. 392.

<sup>5</sup> *Saeger v. McCabe*, 92 Mich. 186; *Rockwell v. Morgen*, 2 Beas. Ch. 389; *Hendrix v. McBeth*, 61 Ind. 473.

<sup>6</sup> *Hendrix v. McBeth*, *supra*; *Dickin v. Hamer*, 1 Dr. & Sm. 295; *MacSwinnney*, p. 48.

<sup>7</sup> *Lenfers v. Henke*, 78 Ill. 405; *Priddy v. Griffith*, 150 Ill. 560, a well considered case.

the case, would best subserve the interests of the parties.<sup>1</sup> The right of the tenant by dower has also been recognized to follow veins unopened in an open mine or quarry,<sup>2</sup> and even to sink new pits to reach deeper veins of the opened mine;<sup>3</sup> but generally the widow is not entitled to dower in unopened mines, as beds of coal underlying the land,<sup>4</sup> nor will the widow of a locator of a claim upon the public land, who dies prior to issuance of a patent, be entitled to dower in such claim, as the right of the husband was a mere possessory right and no estate could be predicated thereon, as against the government or its grantees.<sup>5</sup>

§ 24. *Tenants in common.* — A conveyance of a mine, or mining tract, to two or more persons jointly would create a tenancy in common as to such property with the usual incidents of such tenancies.<sup>6</sup> A lease by one cotenant would constitute his lessee a cotenant of the others and as such he would be liable for the rents and profits received by him;<sup>7</sup> but such co-owners would not, generally, be entitled to a lien on the share of such cotenant or his lessee, except for expenditures acquiesced in by him and for necessities to the common undertaking.<sup>8</sup> Tenants in common of a mine are seised of each and every part of the estate, in common, but it is not in the power of any one to convey the whole of the estate without the authority of the

<sup>1</sup> *Stoughton v. Leigh*, 1 Taunt. 402. In *Billings v. Taylor* (10 Pick. 460), a quarry was located on a four-acre tract; it was considered as an open quarry as to the whole tract and dower admeasured accordingly.

<sup>2</sup> *Crouch v. Puryear*, 1 Rand. (Va.) 258.

<sup>3</sup> *Crouch v. Puryear*, *supra*.

<sup>4</sup> *Dickin v. Hamer*, 1 Drew. & Sm. 284.

<sup>5</sup> *Black v. Elkhorn Mining Co.*, 163 U. S. 445; *Duncan v. Phosphate Co.*, 137 U. S. 647.

<sup>6</sup> *Boston Franklynite Co. v. Condit*, 19 N. J. Ch. 394.

<sup>7</sup> *Barnum v. London*, 25 Conn. 137.

<sup>8</sup> *Kay v. Johnston*, 21 Beav. 536; *Scott v. Nesbit*, 14 Ves. 445; *Mac-Swinney*, p. 112.

other cotenants, or the whole of any distinct portion thereof.<sup>1</sup> And since different portions are as distinctively the property of the entire ownership, as much as the whole property, it is doubtful if a contract for a lease by any cotenant, without the concurrence of his other tenants, could be enforced even as to such tenant,<sup>2</sup> although a conveyance void, as to the other tenants, without their affirmance, because of the prejudice to their rights, would be valid where affirmed by them,<sup>3</sup> and a conveyance by one would, ordinarily, be upheld so far as the grantor alone was concerned.<sup>4</sup> As in the case of co-tenancies of other properties each co-owner has the right to open and work the mine<sup>5</sup> and unless there is some decisive act to show an ouster the possession of one cotenant of a mine inures to all.<sup>6</sup> One cotenant in possession receiving rents and profits from the mine is liable to an accounting to his cotenants, however, for the share due each, and for a failure to so account an appropriate action can be maintained.<sup>7</sup>

<sup>1</sup> *Murray v. Haverly*, 70 Ill. 318.

<sup>2</sup> *Price v. Griffith*, 1 DeG. M. & G. 80; *Hartford & Co. v. Miller*, 41 Conn. 180; *Adams v. Iron Co.*, 7 Cush. 361.

<sup>3</sup> *Hartford & Co. v. Miller*, *supra*.

<sup>4</sup> *Boston F. Co. v. Condit*, 19 N. J. Ch. 394.

<sup>5</sup> As to cotenant's right to possession and use of common property, see: *Job v. Patton*, L. R. 20 Eq. 84; *McCord v. Oakland Q. S. Min. Co.*, 64 Cal. 134; *Morganstern v. Thrift*, 66 Cal. 577; *Conrad v. Saginaw Co.*, 54 Mich. 249; *Anaconda Co. v. Butte Co.*, 17 Mont. 519; *Gaines v. Green Pond Co.*, 33 N. J. Eq. 608; *Angier v. Agnew*, 98 Pa. St. 587; *Early v. Friend (Va.)*, 16 Gratt. 21; *MacSwiney Mines* 110; *Lindley*, Sec. 789; *Rogers* (2 Ed.), 267; *Bainb. (1 Am. Ed.)* 53; 20 Am. & Eng. Enc. Law. (2 Ed.), 787. One cotenant must contribute to expense of co-lessee upon leasehold. *Beck v. O'Connor*, 21 Mont. 109; 53 Pac. Rep. 94. And a refusal will render operating tenant liable only for royalty and not for a tenant's interest to his recalcitrant co-tenants. *Schreiber v. Nat. & C. Co.*, 21 Pa. Co. Ct. 657.

<sup>6</sup> *Van Valkenburg v. Huff*, 1 Nev. 142; *Mallett v. U. S. M. Co.*, 1 Nev. 194.

<sup>7</sup> *Job v. Patton*, *supra*; *Early v. Friend*, 16 Gratt. (Va.) 21; *Abel v. Love*, 17 Cal. 284; *Barnum v. London*, 25 Conn. 187. But see *contra*, *Grubb's App.*, 62 Pa. St. 252; *B. & W. L. C.* 275.

§ 25. **Reversioner or remainderman.** — A reversioner or remainderman is not entitled to work a mine to the prejudice of the tenant for life or years<sup>1</sup> or to the injury of a subsequent remainderman.<sup>2</sup> His rights are to the remainder only and he cannot anticipate their enjoyment, without a grant of the right by the tenant of the particular estate.<sup>3</sup> For all ore severed by a remainderman the tenant of the particular estate would be entitled to an accounting,<sup>4</sup> and as to ore removed from land subject to dower, before assignment, although not then entitled to an interest in the land, as such, the widow could compel an accounting for a third of the produce therefrom so converted.<sup>5</sup> And it is doubtful if such future owner would be entitled to work during the existence of the preceding estate, even though the tenant thereof was prevented from working thereon, for this would not vest any such right in the remainderman prior to the vesting of his estate,<sup>6</sup> and if there was a remainder over after termination of his estate he could not then work, even with the consent of the first tenant, to the prejudice of his remainderman.<sup>7</sup>

<sup>1</sup> *Dickin v. Hamer*, 1 Dr. & Sm. 295; *Bishop v. Bishop*, 10 L. J. Ch. 302.

<sup>2</sup> *Fleming v. Carlisle*, 1 L. C. 786.

<sup>3</sup> *Dickin v. Hamer*, *supra*; *MacSwinney*, p. 65.

<sup>4</sup> *Bishop v. Bishop*, *supra*; *Dickin v. Hamer*.

<sup>5</sup> *Dickin v. Hamer*, *supra*; *MacSwinney*, p. 65.

<sup>6</sup> *Dickin v. Hamer*, 1 Dr. & Sm. 295; *MacSwinney*, pp. 48, 51.

<sup>7</sup> *Evelin*, *Ex parte*, 2 Freem. 53; *Fleming v. Carlisle*, 1 L. C. 786.



## CHAPTER IV.

### RIGHTS OF INDIVIDUALS MINING ON LAND OF THE UNITED STATES.

#### SECTION 26. Character of miner's rights.

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§ 26. Character of miner's rights. — There is perhaps no better illustration of the principle that the people are the real source of the law than the history of the legisla-

tion consequent upon the early settlement and development of the mines in the western portion of the United States. Just what rights do attach to the claimant of mineral ground upon the public land, can only be thoroughly understood by a perusal of the history of the times and the litigation and legislation to which it gave rise. In recognition of the prerogatives of the first taker and in accordance with the English idea of sovereign proprietorship over the mines, and the passiveness of the government in its early legislation on the subject,<sup>1</sup> the idea at first arose that the discoverer of mineral upon the public land had a license from the government to take the ore therefrom, and that this privilege extended not only to land to which the government had the absolute title, but since, in its transfer of public land, the title to the mineral was reserved, that it also extended to land held directly from the government for agricultural and other purposes.<sup>2</sup> But as the granting of a license could only result from the affirmative act of the government and the extension of the miners' rights to property over which individuals had already acquired possessory rights would result in the overthrow of other well defined and settled principles of law, this idea was soon disaffirmed by the courts and the rights of the

<sup>1</sup> See the leading case of *Biddle Boggs v. Merced Mining Co.* (14 Cal. 355); *Blanchard & Week's Leading Cases*, p. 181, *et sub.* The statute is as follows: "§ 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." (Act of Congress May 10, 1872, Ch. 152, § 1.) *Wade Am. Min. Laws*, p. 15.

<sup>2</sup> *Boggs v. Merced Min. Co.*, 14 Cal. 355; *Henshaw v. Clark*, 14 Cal. 460; *Hicks v. Bell*, overruled in *Tennant v. Flower*, 17 Cal.; *Stoakes v. Barrett*, 5 Cal. 36.

miner were more clearly defined and limited.<sup>1</sup> His right to mine for the precious metals did not extend to private lands but must be exercised on public land alone, and although the right to mine carried with it, as incidental thereto, the right to use the timber and the water, these incidents must

<sup>1</sup> "In *Stoakes v. Barrett*, 5 Cal., *McClintock v. Bryden*, *Ibid.*, and *Irwin v. Phillips*, it was decided that the prior possessory rights of settlers on the public lands, for agricultural and grazing purposes, must yield to the rights of miners to extract from the land the precious metals. This was considered a necessary deduction from the statute, which expressly drew the distinction. But this statute, it was held, was not to be extended by construction. If so, it would have required the court to overturn other well defined and settled principles, as laid down in *Tartar v. Spring Creek Co.*, 5 Cal. 395; *Fitzgerald v. Urton*, 5 Cal. 308; *Burdge v. Underwood*, 6 Cal. 45." B. & W. L. C. 131, 311, 727. But see *Boggs v. Merced Min. Co.*, *supra*, where Field, C. J., in treating of this subject, says: "The doctrine of an unlimited general license — put forth in many instances, and advocate by the defense — is pregnant with the most pernicious consequences. If upheld it must lead to the spoliation of landed estates, under the pretense of mining, without possibility of protection or redress on the part of the owner. There is gold in limited quantities scattered through large and valuable districts, where the land is held in private proprietorship, and under this pretended license the whole might be invaded, and, for all useful purposes, destroyed, no matter how little remunerative the product of the mining. The entry might be made at all seasons, whether the land was under cultivation or not, and without reference to its condition, whether covered with orchards, vineyards, gardens or otherwise. Under such a state of things, the proprietor would never be secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting. What value would there be to a title in one man, with a right of invasion in the whole world? And what property would the owner possess in mineral land — the same being in fact to him poor and valueless just in proportion to the actual richness and abundance of its products?" "There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or, if existing, that he wishes to extract and remove it." B. & W. L. C. 131. For general provisions of U. S. statutes, relating to mining claims, see R. S. U. S., Secs. 2318-2352.

also be confined to the public domain.<sup>1</sup> A prior appropriation to a steady individual purpose established a *quasi* private proprietorship, which entitled the holder to be protected in its quiet enjoyment against all the world but the true owner; but his rights were always to be exercised subject to the local rules and customs and the statutes of the State, and such is the nature of the miner's right to-day.<sup>2</sup>

§ 27. Policy of the government. — The State of California, being the first of the western mining States, was first to adopt legislation looking to the development of its mining interest and the mineral on the public land,<sup>3</sup> and

<sup>1</sup> *Tartar v. Spring Creek Waters Mine Co.*, 5 Cal. 395; *Ah He v. Crippen*, 19 Cal. 491; *Wade Amer. Min. Law*, § 18, p. 81; 16 U. S. Stat. at Large, 739; *Mitchell v. Haygood*, 6 Cal. 148; *Campbell v. Rankin*, 99 U. S. 261; *Jackson v. McMurray*, 4 Colo. 76. Possession raises a presumption of title. *Ante, idem*; *Sears v. Taylor*, 4 Colo. 88.

<sup>2</sup> *Boggs v. Merced Min. Co.*, 14 Cal. 355; R. S. U. S., § 10; *Doran v. Cent. Pac. Ry. Co.*, 24 Cal. 245; *English v. Johnson*, 17 Cal. 107; *Bosey v. Gallagher*, 20 Wall. 670; *Golden Fleece M. Co. v. Cable Cons. Co.*, 12 Nev. 327. "But no person who relies on prior possession alone has any right or title that he can assert against the U. S. or its grantee." *Wade Amer. Min. Laws*, § 18; *Ah He v. Crippen*, 19 Cal. 491; *Doran v. Cent. Pac. R. Co.*, 24 Cal. 245; *Heydenfeldt v. Daney Gold & C. Co.*, 98 U. S. 634.

<sup>3</sup> *Boggs v. Merced Min. Co.*, 14 Cal. 355; *McClintock v. Brydon*, 5 Cal. 17; *Stokes v. Barrett*, *Irwin v. Philipps*, *Id.* 140; *Id.* 308. See *Blanchard & Weeks' Notes*, p. 162 *et sub.* "It being undoubtedly the policy of that State, as derived from her legislation, to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner, in evidence of this, acts were passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches, which were known to divert the water of streams from their natural channels for mining purposes, and others of like character. This policy was extended equally to all pursuits, and no partiality evinced, except in the single case where the rights of the agriculturalists were made to yield to those of the miner when gold was discovered in his land. The policy of the exception was obvious. Without it, the entire gold region might have been inclosed in large tracts, and eventually what would have sufficed as a rich country to many thousands would have been reduced to the proprietorship of a few."

although the general government at first only acquiesced in the policy pursued by this State in failing to adopt opposing legislation, it finally, by affirmative acts, favored the policy previously adopted by the California legislature, and by appropriate legislation extended facilities calculated to promote the development of the mines of precious metals in the Western States and Territories.<sup>1</sup> The State recognized the rights of the miner as superior to those of the agricultural claimant upon the public land, and the former was permitted to mine on land previously located for agricultural purposes; <sup>2</sup> but the property rights of the agriculturist were protected by the courts and such reasonable rules established limiting the operations of the miner, as to prevent a disturbance of the improvements of the agriculturist.<sup>3</sup> But although these inducements were early offered the citizen, both by the State and general government, for the development of the mineral resources, in order to protect the rights of the general government, and further the interests of the individual citizen, many local and general statutes were enacted on the subject, prescribing the manner of location and perfection of mining claims, and before a citizen could claim the benefit of these statutes he must first show a faithful compliance with the conditions required.<sup>4</sup>

<sup>1</sup> *Boggs v. Merced Min. Co.*, *supra*; *Clark v. Duval*, 15 Cal. 85; *Smith v. Doe*, *Id.* 100; *United States v. Iron, Sil. Min. Company*, 128 U. S. 673; 9 Sup. Ct. Rep. 195.

<sup>2</sup> *McClintock v. Bryson*, 5 Cal. 97; *Tartar v. Spring Creek & Co.*, 5 Cal. 395; *Id.* 140; *Id.* 308.

<sup>3</sup> *Clark v. Duval*, 15 Cal. 85; *Smith v. Doe*, *Id.* 100.

<sup>4</sup> *United States v. Iron, Sil. Min. Co.*, 128 U. S. 673. But a substantial compliance with mining customs as to posting notice of claims is sufficient where good faith is shown; and such a custom, when invoked years after all other acts of location have been done, should be liberally construed. *Donohue v. Meister*, 88 Cal. 121; 25 Pac. 1096. Mineral lands in Michigan, Wisconsin and Minnesota (R. S. 2345), Kansas and Missouri (R. S. 1 Sup. 104; 19 St. 52), Alabama (R. S. 1 Sup. 404; 22 St.

§ 28. **Prior discovery necessary.** — A prior discovery is necessary to the acquisition of any of the privileges or benefits that can be claimed under the provisions of the United States law.<sup>1</sup> Before mineral is discovered the locator of a mining claim on public land possesses no title to such land, and although his right of possession is generally recognized by local rules and customs,<sup>2</sup> as there is no legislative provision for the determination of such rights prior to discovery, all questions as to the right of one's possession prior to discovery would have to be determined by the rules and customs of the mining district.<sup>3</sup> But when the locator of a mining claim has once discovered mineral on the land which he claims, his right to perfect his claim and title to such land is recognized by the law, and when he has performed all the acts necessary to a valid location he can hold the claim as against a subsequent discoverer, even though the latter succeeds in first completing all the requisite

487) and Oklahoma (R. S. 1 Sup. 929; 26 St. 1026) are excepted from the Government Mineral Law, and mining lands in these States are acquired under patents as agricultural land. "§ 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the States named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner at the same minimum price, and under the same rights of pre-emption as other public lands." (Act of Congress Feb. 18, 1873, Ch. 159, v. 17, p. 465.) As to coal lands see §§ 2347, 2348.

<sup>1</sup> Upton v. Larkin, 7 Mont. 449; 17 Pac. 728; R. S. U. S., Sec. 2320.

<sup>2</sup> B. & W. Ld. Cas. p. 181. "This is the first act that goes to the acquisition of any right or title to a *lode claim* under the provisions of the United States law." Wade's Am. Min. Law, 41; Mor. Min. Rts., Chap. I. (10 Ed.).

<sup>3</sup> *Ante, idem.* "Until mineral is discovered, the prospector may hold possession of a piece of ground under the miners' common law, but not under the laws of Congress." Wade, *supra*.

acts of discovery.<sup>1</sup> The acts of the locator which led to the discovery cannot be questioned by a subsequent locator or an adverse claimant, and it is immaterial whether he made the discovery with or without labor on his part, for the fact of discovery is the only point to be determined.<sup>2</sup> In order to constitute a valid discovery of a lode or vein, however, the mineral must be in place, in its natural position, and at least one wall of the vein should be found to exist;<sup>3</sup> but it is immaterial whether the rock contains a large or small percentage of mineral, and it is not necessary that the labor by which the lode was discovered be performed by the locator. It is sufficient if the same was exposed to his view, and its existence known to the locator, for these facts would be tantamount to a discovery.<sup>4</sup>

§ 29. **Rights of discoverer.** — As a general rule, the first discoverer of mineral on the public land, provided he posts his discovery notice, and follows this act with the remaining acts necessary to a valid location, within the time prescribed by law, can hold the claim against all the world except the general government, or any subsequent discoverer, even though the latter should first succeed in completing all the acts necessary to a valid

<sup>1</sup> *Pellican & Dives M. Co. v. Snodgrass*, 9 Colo. 339.

<sup>2</sup> *Werner v. MacNulty*, 7 Mont. 30; 14 Pac. 643.

<sup>3</sup> *Foote v. Nat. M. Co.*, 2 Mont. 402.

<sup>4</sup> The discovery of "rock in place" bearing mineral, located ten feet below the lowest river rock, will constitute a valid discovery of such mineral. *Cheesman v. Shreve*, C. C. D. Colo., 40 Fed. Rep. 787. Discovery must be within limits of claim located. *Michael v. Mills*, 22 Colo. 439, 440; *King v. Amy Co.*, 153 U. S. 222; *Walsh v. Mueller*, 16 Mont. 180; *Muldoon v. Brown*, 21 Utah, 121; *Conway v. Hart*, 129 Cal. 480; 20 Am. & Eng. Enc. Law (2 Ed.), p. 706 *et sub.* Before a location can be made of oil, as a placer, it must be actually discovered. *Olive Land Co. v. Olmstead*, 108 Fed. Rep. 568. Loss of discovery forfeits claim. *Gwillim v. Donnellan*, 115 U. S. 45; *Lindley on Mines*, 338.

location of the claim.<sup>1</sup> A valid location of a mining claim is made, under the United States statute, when a miner finds a lode or vein, within the approved definition, containing valuable mineral, although he does not, at the time, discover deposits of sufficient value to justify work to extract them, if he is willing to expend his time and money on the claim in the hope of finding ore sufficiently valuable to work.<sup>2</sup> But as the right to the possession of a mining claim is derived only from a valid location, where there has not been a valid location, or a substantial compliance with the requirements of the local or general statute, there can of course be no possession under it.<sup>3</sup>

§ 30. Land must contain valuable deposits.—The government statutes opening mineral land to prospectors contemplate that the land shall really be valuable for mineral purposes, and hence of greater utility than it would be for agricultural or other uses. The terms

<sup>1</sup> *Pellican & Dives Mine Co. v. Snodgraes*, 9 Colo. 339.

<sup>2</sup> *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309; 28 Pac. 315. But see *Sullivan v. Iron, Sil. Min. Co.*, 143 U. S. 431; 36 L. Ed, 214; 12 Sup. Ct. Rep. 555.

<sup>3</sup> *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53. The actual discovery of a vein or lode is essential to the valid location of a mine. *McLaughlin v. Thompson* (Colo. App.), 29 Pac. 816. Nor could a prior discoverer of ore on an Indian reservation avail himself of the discovery as against those making a valid location after the land was opened by the government. *Kendall v. San Juan Sil. Min. Co.*, 144 U. S. 658; 12 Sup. Ct. Rep. 779. If the mineral "known to exist" is in such small quantities as not to justify an attempt to extract it, the land upon which it is found is not "mineral land." *Richards v. Dower*, 81 Cal. 44; 22 Pac. 304. If land is occupied by another or has been appropriated, it cannot be located. *Davis v. Weibold*, 139 U. S. 507; *Steele v. St. L. Sm. Co.*, 106 U. S. 447; *I. S. M. Co. v. Mike & c. G. M. Co.*, 143 U. S. 394; *Hall v. Arnott*, 80 Cal. 348; *DuPrat v. James*, 65 Cal. 555; *Omar v. Soper*, 11 Colo. 380; *Merrill v. Dixon*, 15 Nev. 401; *Ellers v. Boatmen*, 3 Utah, 159; *Wheeler v. Smith*, 5 Wash. 704; 20 Am. and Eng. Enc. Law (2 Ed.), p. 705, *et sub*.



“valuable deposits” and “all forms of deposit,”<sup>1</sup> although sufficiently broad to include all mineral substances, are construed in connection with other statutes and are not held to include such “deposits” as are otherwise specifically disposed of.<sup>2</sup> Hence, although land may contain “valuable deposits,” if a special statute applies to the mineral found, governing its acquisition by private parties, that particular statute must be complied with before the title to the ore or deposits could be acquired,<sup>3</sup> and if the same has been reserved by the general government, or vested in the State, a private individual could not acquire such mineral, even though he should comply with the statute.<sup>4</sup> But if the deposit of ore is such as the locator can rightfully lay claim to, the courts will give a liberal construction to the term “valuable deposit,” and if the party interested is willing to expend his time and money in the extraction of the ore the courts will ordinarily presume that the same is of sufficient value to cover the term “valuable deposit.”<sup>5</sup>

§ 31. **Same—Rock must be “in place.”**—To constitute a valid location of a mining claim the same must be initiated by the discovery of a vein or ledge consisting of something in place,<sup>6</sup> and whether this substance consists of

<sup>1</sup> U. S. Rev. Sta., §§ 2320, 2329.

<sup>2</sup> *Wheeler v. Smith*, 5 Wash. 704; 32 Pac. 784, where limestone was not held to be such deposits as could be acquired by private parties.

<sup>3</sup> U. S. Rev. St., Sec. 2320.

<sup>4</sup> *Wheeler v. Smith* (*supra*); *State Peruvian Phosphate Co. v. Phosphate Com'rs*, 31 Fla. 558; 12 So. Rep. 908.

<sup>5</sup> *Wheeler v. Smith*, *supra*. A valid mining location can be made upon land to be granted to a State, at any time before patent is executed. *Ivanhoe Co. v. Keystone Co.*, 102 U. S. 167; *Heydenfeld v. Daney Co.*, 98 U. S. 634; *St. Joseph & Co. v. Baldwin*, 103 U. S. 426; *Hermocilla v. Hubble*, 89 Cal. 8; *Wedekind v. Craig*, 56 Cal. 642; 20 Am. & Eng. Enc. Law (2 Ed.), 692. But lands containing stone pass to State, unless specially reserved. *South Dakota v. Vermont Stone Co.*, 16 Land Dec. 263.

<sup>6</sup> R. S. U. S., §§ 2320-2322.

rock, clay or earth, it must generally be so colored and decomposed by the mineral elements which enter into its composition, as to render it "easily discernible from the contiguous formations."<sup>1</sup> The term "rock in place," as used in the mining statutes, has been held to mean such rock as is inclosed and embraced in the mass of the solid formation of the surrounding country, as distinguished from the float soil and *debris* of the surface.<sup>2</sup> But if the rock has a fixed *situs* and is such that it can be easily discernible from the contiguous formations, it is immaterial how far away the mineral may have been originally formed or deposited, or that the vein or mineral formation is loose and broken or disintegrated.<sup>3</sup>

§ 32. *Distinction between lode and placer claims.* — A vein, or lode, has been defined by eminent authority to be any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock.<sup>4</sup> Very slight indications of ore in well-defined boundaries, would be sufficient to establish the existence of a lode,<sup>5</sup> but in the sense that it could be traced through the neighboring rock, the vein or lode must be continuous;<sup>6</sup> and

<sup>1</sup> *Burke v. McDonald*, 33 Pac. Rep. 49.

<sup>2</sup> *Jones v. Prospect Mount. Tunnel Co. (Nev.)*, 31 Pac. 642. Petroleum and gas are "in place" so long as confined to the strata, where found. *Williamson v. Jones*, 39 W. Va. 231; *Wood Co. v. W. Va. Tr. Co.*, 28 W. Va. 210; 20 Am. & Eng. Enc. Law (2 Ed.), p. 698.

<sup>3</sup> *Jones v. Pros. Moun. T. Co. (supra)*. For validity of proceedings to locate lode claim, see: *Conway v. Hart*, 129 Cal. 480; 62 Pac. Rep. 44; *Wiltsee v. King of Ariz. Min. & Mill. Co.*, 60 Pac. Rep. 896; *McCann v. McMillan*, 129 Cal. 350; 62 Pac. Rep. 31; *Duncan v. Fulton (Colo. App.)*, 61 Pac. Rep. 244; *Wells v. Davis (Utah)*, 62 Pac. Rep. 3; 20 Amer. & Eng. Enc. Law (2 Ed.), p. 708 *et sub*.

<sup>4</sup> The term lode is no doubt taken from the verb lead, and in mining parlance signifies any formation of ore-bearing rock, by which the miner can be led or guided. *Wade Amer. Min. Law*, p. 32 *et sub*.

<sup>5</sup> *United States v. King*, 9 Mont. 75; 22 Pac. 498.

<sup>6</sup> *Cheesman v. Shreve (C. C. D. Colo.)*, 40 Fed. Rep. 787.

although a vein or lode may, and often does, contain more than one vein, as used under the United States statute, it clearly means lines or aggregations of metal, imbedded in quartz, or other rock in place.<sup>1</sup> On the contrary, the ore in a placer claim is not imbedded in the native rock, but the term signifies ground that includes valuable deposits which are not in place, *i. e.*, not fixed in the rock, but which are in a loose state, mixed with the earth or sand and free from rock.<sup>2</sup> But although the term is usually defined to include only free metal, which has been displaced from the rock, under the United States statute it is held that claims usually referred to as "placers" should include all forms of deposit, except veins of quartz or other rock in place.<sup>3</sup> The manner of location and the conditions under which the two kinds of mining claims are held are entirely different under the law, and the locator of a placer claim cannot hold a vein or lode, within the boundaries of his claim, which he knew existed when he applied for a patent, if he fails to insert an application for such lode or vein also.<sup>4</sup>

§ 33. Lode must be "known to exist." — To constitute knowledge sufficient to enable the locator of mineral

<sup>1</sup> United States *v.* Iron, Sil. Min. Co., 128 U. S. 673.

<sup>2</sup> *Blan. & Weeks Ld. Cas.*, p. 30, *et sub.*; *Wade Amer. Min. Law*, p. 70, Sec. 43.

<sup>3</sup> *Rev. Sta. U. S.*, § 2329 *et sub.*

<sup>4</sup> *Wade Amer. Min. Law*, Sec. 44, p. 71. As to essentials of location, see: *Haws v. Vict. Min. Co.*, 160 U. S. 303; *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55; *King v. Amy & Co.*, 152 U. S. 222; *Kinney v. Fleming (Ariz.)*, 56 Pac. Rep. 723; *Altoona Q. S. M. Co. v. Integral Q. S. M. Co.*, 114 Cal. 100; *Willeford v. Bell (Cal.)*, 49 Pac. Rep. 6; *Duncan v. Fulton (Colo.)*, 61 Pac. Rep. 244; *Taylor v. Paranteau*, 23 Colo. 368; *Golden Terra Co. v. Smith*, 2 Dak. 374; *Clearwater Co. v. San Garde (Idaho, 1900)*, 61 Pac. Rep. 187; *Boyd v. Desrozier*, 20 Mont. 444; *Nesbitt v. Delamar's & Co. G. M. Co.*, 24 Nev. 273; *Lockart v. Wills*, 9 N. M. 344; *Risch v. Wiseman*, 36 Oregon, 484; *Wells v. Davis (Utah, 1900)*, 62 Pac. Rep. 3; 20 *Am. & Eng. Enc. Law* (2 Ed.), 704 *et sub.*

land to prosecute his claim successfully, there should be mineral deposits upon the land claimed which he has ascertained and knows to exist.<sup>1</sup> Mere outcroppings on the surface is not sufficient evidence of the existence of lodes or veins, as to justify their designation as "known" veins or lodes, but in order to meet that designation, the veins or lodes should be clearly ascertained and of such extent as to render the land more valuable on that account.<sup>2</sup> The words "known to exist" refer also to knowledge of the existence of a vein or lode within the boundaries of a placer claim,<sup>3</sup> and a mineral vein or lode is "known to exist" within the meaning of the United States statute, although personal knowledge of the fact may not be possessed by an applicant for a patent for a placer claim, when he has filed his location papers in good faith, and complied with all the other essentials necessary to a valid location.<sup>4</sup> The locator of a placer claim, however, cannot hold a vein or lode within the boundaries of his claim, which he knew existed at the time he applied for a patent for the same, unless he also inserted an application for such vein or lode;<sup>5</sup> but if he did not know of the existence of such vein or lode at the time he filed his application for a patent, his patent would convey to him all valuable minerals subsequently found within the boundaries of his claim, unless a subsequent locator of the vein or lode had filed his adverse claim before the termination of the period of publication of the notice of such application.<sup>6</sup>

§ 34. **Extent of mining claims.** — The extent of mining land which can be claimed by an individual or a corpora-

<sup>1</sup> U. S. Statute, § 2320 *et sub.*

<sup>2</sup> *United States v. Iron, Sil. Min. Co.*, 128 U. S. 673; *Colorado C. & J. Co. v. United States*, 123 U. S. 307.

<sup>3</sup> *Iron, Sil. Min. Co. v. Reynolds*, 124 U. S. 374.

<sup>4</sup> *Noyes v. Mantle*, 127 U. S. 348.

<sup>5</sup> *Wade Amer. Min. Laws*, p. 71.

<sup>6</sup> *Reinheim v. Dahl*, 6 Mont. 167.

tion, qualified to locate, is provided for by the general statutes of the United States, and in no case can a vein or lode claim exceed fifteen hundred feet in length, by six hundred feet in width, and no locator of such a claim can legally hold over three hundred feet on either side of the middle of the vein or lode at the surface.<sup>1</sup> However, the locator of a vein or lode claim cannot be restricted by local rules or State legislation to less than fifteen hundred feet in length, following the course of such vein or lode, and fifty feet in width, *i. e.*, twenty-five feet on either side of the middle of the vein at the surface,<sup>2</sup> and the rule applies as well to associations of persons as it does to a single individual,<sup>3</sup> except where a greater limitation would be necessary in order to protect the rights of adverse claimants previously acquired and existing before the statute came into effect. But placer claimants are not governed by the same rules that pertain to the locators of vein or lode claims, and the amount of land in the two cases, as well as the conditions on which it is held, are

<sup>1</sup> R. S. U. S., § 2320 *et sub.*

<sup>2</sup> Wade Amer. Min. Laws, p. 70.

<sup>3</sup> Wade's Am. Min. Laws, 15. § 2320. "Mining claims upon veins and lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim, located after the 10th day of May, eighteen hundred and seventy-two, *whether located by one or more persons*, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other." (Act of Congress May 10th, 1872, Ch. 152, § 2.)

vastly different.<sup>1</sup> Under the statute no single individual can hold over twenty acres of land as a placer claim and no association of persons, regardless of the number of persons constituting such association, can legally hold over one hundred and sixty acres of land.<sup>2</sup> The distinguishing features between lode and placer claims appears elsewhere in this chapter.<sup>3</sup>

§ 35. **Rights acquired by possession.** — No title to public mineral land is acquired by the claimant as against the government from the mere fact of possession. The only right which is acquired by possession is the exclusive right to hold possession of the land included within the locator's claim and a superior right, as against other third parties, to enter and purchase such land from the government.<sup>4</sup> One

<sup>1</sup> *United States v. Iron, Sil. Min. Co.*, 128 U. S. 673.

<sup>2</sup> *Rev. Sta. U. S.*, § 2329; *Id.* 2331. "§ 2321. Where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where, by the segregation of mineral lands in any legal subdivision, a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes." (Act of Congress, May 10, 1872, Ch. 152, § 10.)

<sup>3</sup> See Sec. 32.

<sup>4</sup> "Possession raises an inference of title. It gives the one in possession a right not only to prevent others from entering to explore the ground for mineral, but from erecting superstructures as well. It is property, and as such subject to execution; may be transferred by deed or written agreement, or by a mere transfer of the possession to another by verbal consent. And when one was in possession at his death, it was held that his possession gave *prima facie* title to his heirs. But no claimant who relies on prior possession alone has any right or title which he can assert against the United States or its grantee." *Wade's Am. Min. Law*, 86; *Sears v. Taylor*, 4 Colo. 38; *Jackson v. McMurray*,

in possession of public land can hold such land as against an adverse claimant, who cannot show a better title than the holder, even though the latter has not yet made a discovery of the mineral, or taken any other steps to perfect a location of the land. The mere fact that one is in possession of such land, prosecuting a search for mineral, is one of the strongest proofs of the locator's good faith, and is sufficient evidence of the possessor's intention to locate a claim, to enable him to hold the same against anyone who would come upon the land for purposes inconsistent with such locator's rights.<sup>1</sup> Possession, in fact, constitutes one of the essentials of a valid location and it has been held that where a party relies upon a location made by himself, if he fails to show possession, he must show all the other acts necessary to a valid location, and a full compliance with the general law and the local rules

*Id.* 76; *Burdge v. Smith*, 14 Cal. 380; *Campbell v. Rankin*, 99 U. S. 261; *Richardson v. McNulty*, 24 Cal. 339; *English v. Johnson*, 17 Cal. 107; *Kinney v. Con. Virginia M. Co.*, 4 Sawyer, 382-450; *Correa v. Frietas*, 42 Cal. 339; *Wade's Am. Min. Law*, p. 36. Valid location will defeat a claim based on mere possession alone. *Belk v. Meagher*, 104 U. S. 284; *Ellers v. Boatman*, 111 U. S. 356; 8 Utah, 159; *Phoenix Mill v. Lawrence*, 55 Cal. 143; *Craig v. Thompson*, 10 Colo. 517; *Burns v. Clark*, 133 Cal. 634; 20 Am. & Eng. Enc. Law (2 Ed.), p. 722. Mere possession is good as against one who cannot show a better title. *Patchen v. Keeley*, 19 Nev. 404; *Crossman v. Pendrey*, 8 Fed. Rep. 693; *Zollers Min. Co. v. Evans*, 2 McCreary (U. S.), 39; *Garthe v. Hart*, 73 Cal. 541; *Gregory v. Pershbaker*, 73 Cal. 109; *Neubaumer v. Woodman*, 89 Cal. 310; *Weese v. Barker*, 7 Colo. 178; *Patterson v. Tarbel*, 26 Oreg. 29; 20 Am. & Eng. Enc. Law (2 Ed.), p. 720 *et sub.*

<sup>1</sup> "A prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of fluming or working his claim; and any subsequent erection, dam, or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of such locator, and he is entitled to recover the damages caused by the obstructions." (*Sims v. Smith*, 7 Cal. 148.) B. & W. L. C. 131, 311, *et sub.*

and regulations.<sup>1</sup> But, on the other hand, where there has been possession and use for a considerable length of time, together with a general recognition of the claimant's rights, this has been held the equivalent to a valid location, and to cure any defects in the location of the claim.<sup>2</sup>

§ 36. Who may locate mining claims. — Citizens of the United States<sup>3</sup> are given the right, by statute, to occupy or purchase public mineral land, under certain regulations, prescribed by law, and according to the rules and customs in force within the mining districts of the different States, so far as the same are not inconsistent with the laws of the general government.<sup>4</sup> But one who is not a citizen, if he has not declared his intention to become such, cannot make a valid location of a mining claim on public land,<sup>5</sup> and if an alien has not been naturalized before the location of his claim, his naturalization during the trial of an action to determine his right to such claim, will not retroact, so as to render his prior location valid.<sup>6</sup> But there is no distinction

<sup>1</sup> *Sullivan v. Heuse*, 2 Colo. 424; *Chapman v. Fay Lang*, 4 Sawyer, 28.

<sup>2</sup> *Kinney v. Con. Va. M. Co.*, 4 Sawyer, 382; *Harris v. Equator Co.*, 2 Colo. 63.

<sup>3</sup> In the absence of evidence to contrary, locator is presumed a citizen. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53.

<sup>4</sup> U. S. R. S., p. 427, § 2819.

<sup>5</sup> *Anthony v. Jillson*, 33 Cal. 296; 23 Pac. 419.

<sup>6</sup> *Woolf v. Manuel*, 9 Mont. 276, 279, 286; 23 Pac. 723; *Copp's U. S. Min. Lands*, p. 238. "§ 2321. Proof of citizenship under this chapter may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation." (Act of Congress, May, 1872.) By statute, alien may now acquire U. S. mining lands. (Act Cong. March 2, 1897; 27 Stat. L. 618; Supp. R. S. U. S., p. 574.) The later cases hold that an alien may hold claim until office found; that claim is not void, and that until alien can become citizen, if he declares his intention, the location is valid. *Manuel v. Wulff*, 152 U.



made between citizens of the United States in regard to their right to locate claims, and if all the other conditions necessary to a valid location have been complied with,<sup>1</sup> the fact that the locator is a minor, if he is a citizen, will not invalidate his location.<sup>2</sup> A corporation may also locate, or join in the location of a claim upon the public mining land, in like manner as an individual citizen, provided its members are all citizens of the United States and the corporation was organized under the laws of one of the States of the Union.<sup>3</sup> And it is presumed the courts would extend the statute to include unmarried women, as the benefit of a similar statute, donating public land, has been extended, by construing the words "single man," in its generic sense, to include unmarried women.<sup>4</sup>

§ 37. **Same — Agent may locate claim.** — Any person who is a citizen of the United States and is otherwise entitled to locate a claim on the public domain in his own name, may perform all necessary acts of appropriation through

S. 505; *Lone Jack Co. v. Megginson*, 82 Fed. Rep. 89; *Ferguson v. Neville*, 51 Cal. 356; *Justice Min. Co. v. Lee*, 21 Colo. 260; *Wilson v. Triumph Co.*, 19 Utah, 66; *Strickley v. Hill*, 62 Pac. Rep. 898; *McKinley Cr. Min. Co. v. Alaska United Min. Co.* (1902), 188 U. S. 563; 22 Sup. Ct. Rep. 84; 20 Am. & Eng. Enc. Law (2 Ed.), pp. 701, 702 *et sub.*

<sup>1</sup> *U. S. v. Iron Sil. Min. Co.*, 128 U. S. 673; 9 Sup. Ct. Rep. 125.

<sup>2</sup> *R. S. U. S.*, § 2319. **Infant can locate claim.** *Thompson v. Spray*, 72 Cal. 528.

<sup>3</sup> *McKinley v. Wheeler*, 130 U. S. 680; 9 Sp. Ct. Rep. 638. But proof of citizenship is necessary in all cases to establish claimant's right. To entitle a corporation to locate a mining claim, it must have been organized under the laws of one of the United States. *McKinley v. Wheeler*, 130 U. S. 680; *Dahl v. Mont. Cp. Co.*, 132 U. S. 264; *Doe v. Waterloo Mining Co.*, 44 U. S. App. 204; *Thomas v. Chisholm*, 18 Colo. 105; *Stem-winder Min. Co. v. Emma &c. Con. Min. Co.*, 2 Idaho, 421. See also *R. S. U. S.*, Sec. 2321; 20 Am. & Eng. Enc. Law (2 Ed.), p. 702.

<sup>4</sup> *Silver v. Ladd*, 7 Wall. 219; *Copp's U. S. Min. Lands*, p. 238. This is chivalrous in the courts, to say the least.

the agency of others.<sup>1</sup> The same rules apply in regard to ratification of the unauthorized acts of the agent, as pertain under the general law of principal and agent, and a person in whose name another makes an unauthorized location of a mining claim, assuming to act as his agent, is held to ratify the unauthorized act of such agent, by bringing an action to quiet the title which he acquired under such location.<sup>2</sup> The right to a mining claim is primarily in the person in whose name it was located, even though such person's express consent to the location does not appear, and the location can be made by the agent of a corporation the same as by the agent of an individual citizen.<sup>3</sup> If the claimant is not a resident of the district where the claim is located, the application for patent and the affidavits required by statute may be made by such claimant's authorized agent, where the agent is conversant with the facts sought to be established by such affidavit,<sup>4</sup> but where a contract is made and a patent sought to be obtained in the name of some third party, with a view to obtain more land than the law permits, such contract would be construed as an agreement to defraud the government, and anyone entering into such a contract would lose any equities that he might possess in or to such tract of land.<sup>5</sup>

§ 38. Claim must be "distinctly marked." — Under the general United States statutes one of the first acts to

<sup>1</sup> *Murley v. Ennis*, 2 Colo. 300.

<sup>2</sup> *Thompson v. Spray*, 72 Cal. 528; 14 Pac. 182.

<sup>3</sup> *Murley v. Ennis*, *supra*; *Whitman Min. Co. v. Baker*, 8 Nev. 386. For location by agents, see: *Ledoux v. Forrester*, 94 Fed. Rep. 600; *Rush v. Franch*, 1 Ariz. 99; *Moore v. Hammerstag*, 109 Cal. 122; *Dunlap v. Pattison* (Idaho), 42 Pac. Rep. 504; *Weeland v. Huber*, 8 Nev. 203; *Morrison v. Regan* (Idaho, 1902), 67 Pac. Rep. 955; 20 Am. & Eng. Enc. Law (2 Ed.) 708.

<sup>4</sup> U. S. Sta. at Large, § 2331.

<sup>5</sup> *Mitchell v. Cline*, 84 Cal. 409; 24 Pac. 164.

be performed by the locator of a claim upon the public mineral land is to mark such claim distinctly upon the ground, so that its boundaries can be traced.<sup>1</sup> Aside from this one general statutory provision, most of the acts necessary to a valid location are prescribed and regulated by the state legislatures, or the local rules and customs of the different mining districts.<sup>2</sup> Just what acts are necessary in order to constitute a sufficient marking of the ground has been a subject of consideration for the courts, and while the language of the statute is sufficiently clear to convey the meaning and object of the provision, like many other terms that are clear and unambiguous to an ordinary mind, when brought into dispute, such terms must undergo a technical construction, in order to determine the exact meaning of the words used, and the acts necessary to accomplish the object had in view.<sup>3</sup> It is not deemed necessary, however, to trace the boundary lines throughout their entire length, or to erect fences or other inclosures for the purpose of marking the claim upon the ground, but whatever means is used in

<sup>1</sup> *Marshall v. Harney Peak Tin Min. &c. Co.* (S. D.), 47 N. W. 290 (stating essentials of a complete location). A failure to mark the boundaries is fatal to validity of claim. *Anthony v. Jilson*, 88 Cal. 296. Stakes used for corners are sufficient compliance with R. S. U. S., § 2324. *West Granite Moun. M. Co. v. Granite Moun. M. Co.*, 7 Mont. 356: "Where it is shown that a mining claim has been located in good faith, if language used in referring to natural objects and permanent monuments will impart notice to a subsequent locator, it is sufficient." *Morrison v. Regan* (Idaho), 67 Pac. Rep. 955. A location of more than the statutory amount of land is void as to excess only. *Parley's Park M. Co. v. Kerr*, 180 U. S. 256; *Richmond Co. v. Rose*, 114 U. S. 576; *Howeth v. Sullenger*, 118 Cal. 547; *Taylor v. Parenteau*, 28 Colo. 368; *Hanvon v. Fletcher*, 10 Utah, 266. But in Montana and Idaho, an excessive location is held to avoid the claim. *Legatt v. Stewart*, 5 Mont. 107; *Burke v. McDonald*, 2 Idaho, 646; 20 Am. & Eng. Enc. Law (2 Ed.), 716 *et sub.*

<sup>2</sup> *Ante, idem.* Wade, p. 46.

<sup>3</sup> Claim should be marked so that it can be readily traced. As to manner of marking claim, see: *Cheesman v. Shreve* (C. C. D. Colo.), 40 Fed. Rep. 787.

order to accomplish the object of the statute, if the boundaries "can be readily traced" upon the ground, this would be held a sufficient compliance with this provision of the statute.<sup>1</sup>

§ 39. **Description and survey.** — Where there has been a public survey of the land upon which a mining claim is located, the claim should be described with reference to the lines and corners of the public survey,<sup>2</sup> and although this provision of the statute was intended to apply only to the descriptions in patent surveys,<sup>3</sup> as natural objects and permanent monuments are always to be desired in such descriptions,<sup>4</sup> the above provision, when applicable, applies with equal propriety to the description of a mining claim in the locator's notice of location. The claim may be described by metes and bounds and courses and distances, and while it is better for the measurements to be made by a surveyor, it is not absolutely necessary that the work should be so performed, and if the claim is limited to the proper size and shape it will be a sufficient compliance with this provision, if the boundaries are "distinctly marked upon the ground," and the identification is made by reference to some natural objects or permanent monument.<sup>5</sup>

<sup>1</sup> Wade Amer. Min. Law, p. 46. Blanchard & Weeks Lead Cas., p. 204 and cases cited.

<sup>2</sup> Wade Amer. Min. Law, p. 51. "The survey of a mining claim for the purpose of applying for a patent from the United States, is the act of the claimant and not of the government, and if he has applied for patent before sufficient development has been made to show the strike of his vein, and if thereupon after the patent issues the vein is found to depart from the survey lines, it is lost to the patentee. The surveyor acts for the claimant, and he is not required either to discover or show the course of the vein." *Wolfly v. Lebanon M. Co.*, 4 Colorado, 187; M. M. D., 864.

<sup>3</sup> Wade, p. 19.

<sup>4</sup> Tiede. R. P., § 8; *Kelly v. Taylor*, 23 Cal. 11.

<sup>5</sup> *Drummond v. Long*, 9 Colo. 538.

But while it is not necessary, in the description of lode claims, that the description conform to a prior public survey, in the location of "placer claims," the statute provides that where the land has been previously surveyed by the United States, the entry, in its exterior limits, must conform to the legal subdivisions of the public lands.<sup>1</sup> In other respects, however, claims usually called "placers" are subject to entry and location upon the same conditions and proceedings that are provided for the location of vein or lode claims,<sup>2</sup> and where the same cannot be laid out according to the legal subdivisions of the public land, the statute provides that they may be surveyed and platted in the same manner, as though the claim was located on unsurveyed land.<sup>3</sup>

§ 40. Notice of location. — After the claim has been surveyed, the claimant must post a copy of the plat of the survey at the discovery shaft, or some other conspicuous place upon the claim, together with a notice of his location and intention to apply for a patent for the claim.<sup>4</sup> No precise form or manner of expression is necessary to the validity of the notice, but it should state the date of posting, the full name of the claimant or claimants and the name of

<sup>1</sup> U. S. Sta. 233. "Description of bar placer claims, giving name of claim and adjoining claim, size and location in canyon: *Held*, sufficient." *Grady v. Early*, 18 Cal. 109; M. M. D. 73.

<sup>2</sup> *Ante*, *idem*.

<sup>3</sup> *Wade Amer. M. Laws*, p. 20. The fact that a placer claim is located on legal subdivisions of surveyed ground, does not dispense with the necessity of marking the lines of location on the ground, so that its boundaries "can be readily traced," as required by U. S. R. S., § 2324. *White v. Lee*, 78 Cal. 593; 21 Pac. 363.

<sup>4</sup> "Placing a notice of location headed with a certain name upon a lode is naming the lode. It is sufficient if the notice be placed in such reasonable proximity and relation to the ledge, as, in connection with the work doing under it, will give notice to all comers what ledge is intended." (*Phillipots v. Blasdell*, 8 Nev. 61.) B. & W. L. C. 311.

the claim, mine, or lode,<sup>1</sup> and although the plat of the claim, when posted with the notice of location, will always show the dimensions and extent of the land claimed, as in the case of a notice for a patent, it is best to state in the notice of location the extent and presumed direction of the claim, the names of adjoining claims, or the nearest located claims, the mining district or county, and, if the location has been recorded, the place where the record may be found.<sup>2</sup> These are the essential facts to be stated in a notice of location, but as the identification of the claim is the main object of the description, a detailed and accurate description of the claim is not required,<sup>3</sup> and a notice that identifies the claim by reference to some natural object or permanent monument, or which described it by metes and bounds, and as being a certain distance from another well-known claim, would be held a sufficient compliance with the requirement of the act of Congress as to the description.<sup>4</sup>

§ 41. Notice must be recorded. — The notice of location is generally required by local rules or regulations to be recorded in the district or county where the claim is located,<sup>5</sup> but in the absence of custom or local rules requir-

<sup>1</sup> Wade Amer. Min. Law, pp. 117 and 118 and cases cited. Technical accuracy in the filing and recording of notice is not required. *Talmadge v. St. John*, 129 Cal. 430; *Sanders v. Noble*, 22 Mont. 110; 29 Am & Eng. Enc. Law (2 Ed.), 709.

<sup>2</sup> Wade Amer. Min. Law, *supra*.

<sup>3</sup> *Upton v. Larkin*, 7 Mont. 449.

<sup>4</sup> *Garfield M. & M. Co. v. Hamer*, 6 Mont. 53; *Thompson v. Spray*, 72 Cal. 528. But a notice which describes the claim without reference to natural objects or permanent monuments is not good. *Baxter & Co. Gold Min. Co. v. Patterson*, 8 N. M. 179.

<sup>5</sup> Sta. U. S., Sec. 2324. "After entry of a mining claim in the land office, a relocation of the premises cannot be made by another so long as that entry stands, and such a relocater acquires no rights of possession or otherwise which will sustain a suit by him in the courts to compel a conveyance to him of the legal title." *Neilson v. Champaigne Min. & Mill. Co.* (U. S. C. C., D. Colo.), 111 Fed. Rep. 655.

ing it, it is not essential to the validity of the location that the notice should be recorded, for there is no provision in the general statute requiring the notice of location to be recorded.<sup>1</sup> By Federal statute, however, the right to require the recording of the notice of location is left entirely to local regulations, and although the statute seems to presume that the notice will be recorded, the necessity for recording and the effect of the record, as well as the manner of recording, is left entirely to local regulation.<sup>2</sup> Like the recording acts of the different States, the object of recording the notice of location is to furnish notice to subsequent claimants of the same ground, and as actual possession of the land is equivalent in law to notice from the record, the fact that the location notice is not on record will not, ordinarily, defeat the claim of one in actual possession of the land, whatever may be the consequences of a failure to record the notice and notwithstanding the fact that local rules or regulations require that a record shall be made.<sup>3</sup> The rights of the locator are not affected by errors in the record, and errors can generally be corrected without even affecting the validity of the record.<sup>4</sup> The record dates from the time the notice or certificate of record was placed on file and when the locator has filed the notice of location for record, this is ordinarily all that is required for him to do.<sup>5</sup>

<sup>1</sup> Thompson v. Spray, 72 Cal. 528; Fuller v. Harris, 29 Fed. Rep. 814; Wade Amer. Min. Law, pp. 49 and 50.

<sup>2</sup> "A substantial compliance with such customs is sufficient and when they are invoked years after all other acts of location have been made they will be liberally construed by the courts." Donahue v. Meisker, 88 Cal. 121.

<sup>3</sup> Wade Amer. Min. Laws, p. 49; Mor. Min. Rts. (10 Ed.), Ch. II.

<sup>4</sup> Ante, *idem*. Patterson v. Min. Co., 23 Cal. 575; Gold Hill Co. v. Ish, 5 Oregon, 104.

<sup>5</sup> Wade, p. 50. When recorded the record is *prima facie* evidence of the facts set forth in the notice. Jantzen v. Ariz. Cop. Co. (Ariz.), 20 Pac. 93; Mor. Min. Rts., *supra*.

§ 42. **Tunnel locations.** — The Federal statute provides that where a tunnel is run for the development of a vein or lode, the owners have the right to all veins or lodes discovered in such tunnel, within three thousand feet from the face of the tunnel, to the same extent as if such veins or lodes were discovered from the surface.<sup>1</sup> The object and effect of this provision is to give the owners of the tunnel, who are prospecting in good faith for mineral, the right of fifteen hundred feet of any blind lode, which may be discovered by such tunnel, within three thousand feet from the point of commencement of the tunnel.<sup>2</sup> The same rules apply in the location of a tunnel claim, in regard to posting notice and recording a description of the claim that are necessary in the case of surface locations, and to prevent speculators from taking an improper advantage of this provision of the statute, tunnel claimants are held to a strict compliance with its terms,<sup>3</sup> and in order to show their good faith in the premises, they are required to file a sworn statement with the recorder, together with the notice of location.<sup>4</sup> Where the terms of the statute are complied with, however, the owners of the tunnel can hold all veins discovered within three thousand feet from the face of the tunnel, and after the commencement of the

<sup>1</sup> Wade Amer. Min. Law, pp. 67-70.

<sup>2</sup> *Ante, idem.* "From the language of the statute (Rev. Stat. U. S., § 2323) it is quite plain that the exclusive right to locate claims on the line of the tunnel, extends 3,000 feet from the 'face' of the tunnel. This term, face, is defined as synonymous with 'breast.' The term 'breast' is frequently used among miners to signify that portion of the tunnel in which the work is prosecuted — the end opposite to the opening. But 'face' is used in the statute to mean that point where the tunnel is commenced or goes under cover. And the length of the tunnel site is 3,000 feet from this point." Wade Am. Min. Law, *supra*.

<sup>3</sup> Wade Amer. Min. Laws, p. 114. A tunnel location must be made in subordination to a prior lode claim. Calhoun Gold Min. Co. v. Ajax G. M. Co., 182 U. S. 499; Mor. Min. Rts. (10 Ed.), Chap. I. 26, 40.

<sup>4</sup> "Statute only gives right to locate lodes that are discovered." Wade Amer. Min. Law, pp. 68-69; Mor. Min. Rts. (10 Ed.), p. 206.



tunnel no other party can make a valid location of any vein or lode on the line of the tunnel, which does not appear upon the surface and was not previously "known to exist."<sup>1</sup>

§ 43. **What location includes.**—The location of vein or lode claims by the general and local statutes are held to include the right to possess all surface ground within the boundaries of the claim, and the right to mine and enjoy all veins and lodes of mineral throughout their entire depth that would fall within the boundaries of the claim, if they were extended vertically downward.<sup>2</sup> The locator also has the right to any valuable rock or loose mineral found upon the surface of the soil.<sup>3</sup> But the locator's right to use the surface does not extend beyond the boundaries of his own claim, and when he has once marked the boundaries and

<sup>1</sup> R. S. U. S., § 2323; *Rico-Aspen Con. M. Co. v. Enterprise M. Co.* (C. C. D. Colo.), 53 Fed. Rep. 321. The discoverer of a lode in a tunnel claim is entitled to 750 feet each way from the point of discovery, under R. S. U. S., § 2320, providing that a claim may "equal, but shall not exceed 1,500 feet in length, along the vein or lode." *Ellet v. Campbell* (Colo.), 33 Pac. 521. A mining claim located upon a previous tunnel location, is void. *Hope Min. Co. v. Brown*, 11 Mont. 370; *Enterprise M. Co. v. Rico-Aspen Co.*, 167 U. S. 108; *Campbell v. Ellet*, 167 U. S. 116; s. c. 18 Colo. 510; 20 Am. & Eng. Enc. Law (2d Ed.), 696.

<sup>2</sup> *Wade Amer. Min. Law*, pp. 285, 286. "One of the rights guaranteed by the Act of Congress, which could not be claimed before by virtue of location, is a right to 'all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically,' etc. However this provision as it affects 'cross veins' may be modified by a subsequent section of the same statute, it still holds good as to side veins, whether discovered above or below the surface. These additional or subsequently discovered veins, if found outside of the claim, might have been followed through it in any direction, under the old law, or rather old set of local rules. And, for the purpose of asserting this right, the author of the new discovery might enter upon the old location to mark out the boundaries of his claim."—*Wade*, p. 62. Rev. Stat., § 2322; Rev. Stat. U. S., § 2386.

<sup>3</sup> *Ante, idem*; *Mor. Min. Rts.* (10 Ed.), pp. 208-9.

made a location of his claim, they cannot afterwards be changed to conform to the direction of the vein or lode, if the change would in any way conflict with the rights of other locators upon adjacent claims. The locator of a vein or lode claim is also given the right by statute to mine and claim all veins and lodes whose apex is within his boundaries, although the veins or lodes may extend beyond the side lines of his claim, provided the vein or lode, at the point where it departs from a vertical position, lies in a downward course.<sup>1</sup> But where the location does not include the apex of the vein, the locator cannot claim the right to mine the vein beyond the side lines of his claim, and he has no right to follow a vein beyond the end lines of his claim, whether the vein is "on the dip," or otherwise;

<sup>1</sup> Wade Amer. Min. Laws, p. 63 *et sub.* See R. S. U. S. 2322, 2326. "One of the most important provisions of this section is that which secures the right not only to that part of the vein or lode which lies within the side lines extending downward vertically, but to so much of it as departed from the vertical side lines on the *dip*. This provision has been fruitful of no little contention and expensive litigation. As it affects patented and unpatented claims alike, it qualifies the general doctrine of ownership to the center of the earth, which applies to titles to real estate in general. *Dip*, is simply that departure from a vertical position, which is one of the incidents of almost all veins in their downward course. The apex is simply the top of the lode, or terminal point, where it comes nearest the surface. As applied to vertical veins, these terms present few difficulties in construing the statute. The only one upon which serious doubt has been expressed is whether a subsequent location on the apex would take precedence of a prior discovery and location on the same vein below the apex, so as to allow the later discovery to follow the vein, not only within the side lines of the earlier one down to the point where the vein was first discovered, but below that, and thus appropriate the entire vein. Or whether the first discoverer and locator might follow the dip up, as well as down. There can be no doubt that the location which does not include the apex, confers no rights beyond the side lines."—Wade, p. 63. Rev. Stat. U. S., § 2322; Bullion M. Co. v. Croesus M. Co., 2 Nev. 169; Iron-Silver M. Co. v. Cheeseman, 1 Colo. 461; Eureka &c. Co. v. Richmond M. Co., 4 Sawyer (U. S. Cir. Ct.), 302; Iron Mine v. Loella Mine, 1 Colo. 16-23; Mining Co. v. Tarbet, 98 U. S. 463; Van Zandt v. Argentine M. Co., 1 Colo. 524. The apex of

nor can he go beyond the side lines of his claim, except when the vein is "on the dip."<sup>1</sup>

§ 44. **Value of land office decisions.** — The decisions of the United States land offices and those of the Secretary of the Interior, construing the different mining acts, are of recent years growing quite voluminous and often pass upon rights of vast importance as between individuals and the general government. It may be stated as a general rule that their decisions upon the facts in the cases which they are called upon to pass, if the same are unaffected by fraud or mistake, will be held to be conclusive by the courts,<sup>2</sup> and before a case has been finally passed upon and adjudicated in the land office the courts would not exercise their jurisdiction to interfere by extraordinary remedy of mandamus or injunction to compel the land department officials to discharge their duties.<sup>3</sup> But after the government has conveyed its title to the land, and the question to be determined has become one of private rights, the decisions of the land offices have not the authorized utterance of law upon such rights, and the aid of the courts can be invoked to investigate the character of their decisions and adjudicate the rights involved, under the law.<sup>4</sup> The decisions of the land office are not conclusive upon the rights of the parties, and in all cases where fraud or mistake is alleged, the courts will investigate the proceedings

a vein is not always a point, but frequently a line of great length, any portion of the apex on the course or strata of the vein, found within the limits of a claim, is sufficient discovery to entitle the locator to obtain title. *Larkin v. Upton*, 144 U. S. 19; 12 Sup. Ct. Rep. 614; *Mor. Min. Rts.* (10 Ed.), pp. 208-9.

<sup>1</sup> *Ante, idem*; *Mor. Min. Rts.* (10 Ed.), pp. 212, 319.

<sup>2</sup> *Minnesota v. Batchelder*, 1 Wallace, 109.

<sup>3</sup> *Silver v. Ladd*, 2 Wallace, 209.

<sup>4</sup> *Silver v. Ladd*, 7 Wal. 219; *Lyttle v. Arkansas*, 22 How. 192; *Garland v. Winn*, 20 How. 8; *Lindsay v. Howes*, 2 Black, 559; *Tinley v. Williams*, 9 Crouch, 164; *Hunt v. Wyckliff*, 2 Peters, 201.

by which titles are sought to be vested, inquire into the facts of disputed entries and afford the proper relief to the parties litigant, notwithstanding the decisions of the register and receiver.<sup>1</sup>

§ 45. **Distinctions between locations of ledge and surface.**— Under the common law the possession of the surface of the soil carried with it the right to everything above and below the surface.<sup>2</sup> But this doctrine can have little application to the law of mines and minerals, for its practical enforcement would be next to an impossibility. Such a doctrine would enable the settler on public land for agricultural purposes to claim all the minerals beneath the surface, and give to the locator of a "blind ledge" the right to follow the same to the surface and claim the most extensive and valuable improvements the agriculturist had erected thereon.<sup>3</sup> Accordingly it has been held that the right to the possession of a "blind ledge," without surface indications, did not carry with it the right to erections on the surface;<sup>4</sup> nor would a surface location necessarily carry with it the right to an undiscovered ledge or lode beneath the surface, and particularly if the surface was located for other than mining purposes. Hence, in the

<sup>1</sup> *Bernard's Heirs v. Ashley's Heirs*, 18 How. 43; *Cunningham v. Ashley*, 14 How. 377; *Johnson v. Townsley*, 13 Wal. (U. S.) 72. In *Lyttle v. Arkansas*, 22 How. (U. S.) 192, the court, delivering its opinion, says: "Another preliminary question is presented on this record, namely, whether the adjudication of the register and receiver \* \* \* is subject to revision in courts of justice, etc. \* \* \* We deem this question too well settled in the affirmative for discussion." (See also *Magwire v. Tyler*, 1 Black (U. S.), 195; *Tate v. Carney*, 54 How. U. S. 357; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Doe v. Eslava*, 9 How. 421; cited in *B. & W. L. C.*, p. 202, *et sub*.)

<sup>2</sup> *Tiedeman R. P.*, § 2; *Blackstone's Com.*

<sup>3</sup> *Blanchard & Weeks Lead. Cas.*, p. 203, *et sub*.

<sup>4</sup> *Bullion Min. Co. v. Croesus G. & S. Min. Co.*, 2 Nev. 168; *idem*, p. 204.

simple location of a ledge, without a location of the surface, the locator's rights attach only to the ledge,<sup>1</sup> and if the surface is held adversely, he must work his ledge from some accessible point on the surface which is not occupied, or obtain the right to work it from the owners of the surface of the soil.<sup>2</sup> But if the ledge extends to the surface of the soil, as it often does, the locator of the ledge is then entitled to the surface also, but this is only true when the outlines of the ledge are plainly visible at the surface.<sup>3</sup>

§ 46. **Location in name of another.** — One person can make a valid location of a mining claim in the name of another, but the party making such location, although he occupies and works such claim, cannot maintain an action for injury thereto in his own name, if the location was made in the name of another.<sup>4</sup> And so where one locates a mining claim for himself and others, the relation of cotenants is established between them, and the party making the location cannot bind his other cotenants on any contract made in their joint names in regard to the disposition or changing of such claim without their knowledge or consent.<sup>5</sup> But if the relation of copartners had been established between the owners of the claim they would be bound in such case by the acts of their copartner,<sup>6</sup> and even though this relation did not exist, if they should verbally consent to such a contract in their relation as cotenants,

<sup>1</sup> Blanchard & Weeks Lead. Cas. and notes, p. 162; *McClintock v. Bryden*, 5 Cal. 97; *Irwin v. Phillips*, 5 *Id.* 140; *Fitzgerald v. Norton*, 5 *Id.* 308.

<sup>2</sup> Blanchard & Weeks Ld. Cas., p. 202, and cases cited.

<sup>3</sup> *Ante*, *idem*; *Mor. Min. Rts.* (10 Ed.) 136, *et sub.*

<sup>4</sup> *Van Valkenberg v. Huff*, 1 Nev. 142.

<sup>5</sup> *Chase v. Savage Sil. Min. Co.*, 2 Nev. 9; *Blanchard & Weeks Ld. Cas.*, p. 201, *et sub.*

<sup>6</sup> *Blanchard & Weeks Lead. Cas.*, p. 572, *et sub.*

this would be sufficient to support the contract, and it could be enforced against them.<sup>1</sup> And where one person locates a claim in the name of another, if such person should afterward abandon the first location and locate the same in his own name, he would thereby acquire an independent right over such claim, which would date from the time of the relocation.<sup>2</sup>

§ 47. Mining claims on school, railroad and other grants. — Contests were quite frequent at an early day in the Western States between locators of mining claims and those claiming title by virtue of grants from the general government of land for school and other public purposes. Such contests often arose between the locator and grantees of the State to land acquired by special Act of Congress for school purposes, and not the less frequent were those claiming title by reason of special grants to railroad corporations, parties to such disputes.<sup>3</sup> Considerable discord arose between the holdings of the State and United States courts as to the exact status of the miners' right to locate claims upon land previously granted by the government for public purposes, and the decisions are to a certain extent irreconcilable.<sup>4</sup> After the title to the land had been transferred from the government to its grantee, for whatever purpose, there would seem to be no doubt of the latter's

<sup>1</sup> *Chase v. Savage Silver Min. Co.*, 2 Nev. 9.

<sup>2</sup> *Van Valkenburg v. Huff*, 1 Nev. 142; *Mor. Min. Rts.* (10 Ed.) 186.

<sup>3</sup> *McLaughlin v. Powell*, 50 Cal. 64; *Railroad v. Smith*, 9 Wall. 98; *Alford v. Barnum*, 45 Cal. 482; *People v. Strattan*, 25 Cal. 242.

<sup>4</sup> *Blanchard & Weeks' Leading Cases in Mines and Minerals*, p. 684, *et sub.* The statutory reservation of minerals in grants to railroads, is held to reserve, absolutely, all minerals, whether known to exist at time of grant, or not. *Barden v. North. Pac. R. R. Co.*, 154 U. S. 288; *Smith v. North. Pac. Co.*, 19 U. S. App. 131. The former case overrules the previous holdings upon this point. 20 Am. & Eng. Enc. Law (2 Ed.), 690.

right of disposition and undisturbed possession, and this was the view of the matter taken by the State courts, by whom the rights of the miner were held to be subservient to the claimant, by title from the government, for school or railroad purposes.<sup>1</sup> But as such grants were only made by the government for special purposes and the object of the donation could be equally subserved by granting lands not rich in mineral, the Federal tribunals established certain rules in the nature of conditions precedent to the vesting of the title to such lands, and held that until the land had been surveyed and other formal acts of transfer performed by the government, the mining claimants had superior rights upon such land, and on the discovery of mineral, could successfully locate claims thereon.<sup>2</sup> And some of the cases have gone to the extent of holding that such grants were not intended to include land rich in mineral, and that in specifying the purposes for which the donation was made, there was an implied reservation of mineral land.<sup>3</sup> But such authorities are questionable, for without an express reservation, it is subtle reasoning to arrive at such an intention.<sup>4</sup>

<sup>1</sup> *Higgins v. Houghton*, 25 Cal. 252; *Foley v. Harrison*, 15 How. 447; *Cooper v. Roberts*, 18 How. 173; *Sherman v. Bulck*, 45 Cal. 656; *Veeder v. Duffy*, 3 Wis. 520; *Lessieur v. Price*, 12 How. 59; *How v. Missouri*, 12 How. 126. "The Supreme Court of California, in *Sherman v. Bulck*, *supra*, held that the title to each sixteenth and thirty-sixth section, upon its being surveyed, vested absolutely in the State of California; that Congress had no power, after the passage of that act, to impair the grant or prevent the title to those sections, upon their being surveyed, from vesting in the State, and that therefore the Act of Congress of May 30th, 1862, did not have the effect to extend the right of pre-emption over those sections." B. & W. L. C. 89, 90, 684.

<sup>2</sup> *Kissell v. St. Louis Public Schools*, 18 How. 19; *Gaines v. Nicholson*, 9 How. 365; *Terry v. Mergeld*, 24 Cal. 624; *Grayson v. Knight*, 27 Cal. 507; *Middleton v. Lowe*, 30 Cal. 596; *West v. Cochran*, 17 How. 413; *Ry. v. Smith*, 9 Wall. 99; *Railroad v. Tremont Co.*, 9 Wall. 90.

<sup>3</sup> Decision of Secy. of Interior, *Copps' U. S. Min. Decisions*, pp. 30, 31; Decision of Case of Gen. Land Office, *ante, idem*.

<sup>4</sup> See *Borden v. R. R. Co.*, 154 U. S. 288. Townsite grants cannot

§ 48. **Locator must work claim.** — The miners of the different mining districts are allowed considerable latitude in regard to the regulations which they may pass governing the location of claims upon the public land, and about the only limitation placed upon their power to prescribe rules for the location of such claims is the general provision of the United States statutes, that they shall not be in conflict with the laws of the United States, or the statutes of the different mining States.<sup>1</sup> The statute of the United States<sup>2</sup>

effect a valid mining location. R. S. U. S., Sec. 2392; *Dower v. Richards*, 151 U. S. 661; s. c. 81 Cal. 44; *Davis v. Weibold*, 139 U. S. 507; *O'Keefe v. Cannon*, 52 Fed. Rep. 898; *Blackmore v. Reilly* (Ariz.), 17 Pac. Rep. 72; *Tombstone Townsite cases* (Ariz.), 15 Pac. Rep. 26; *Butte City Lode Cas.*, 6 Mont. 397; 20 Am. & Eng. Enc. Law (2 Ed.), 691. A location upon an Indian reservation is void. *Kendall v. San Juan S. M. Co.*, 144 U. S. 658; s. c. 9 Colo. 349; *McFadden v. Mt. View M. Co.*, 97 Fed. Rep. 670; 20 Am. and Eng. Enc. Law (2 Ed.), 690. But a location, in good faith, upon an Indian reservation will be upheld, after reservation is opened to the public. *Noonan v. Caledonia G. M. Co.*, 121 U. S. 393; 20 Am. and Eng. Enc. Law, *supra*. A location upon a military reservation is void, or has been so held by the Interior Department. *Ft. Maginnis*, 1 Land. Dec. 552; 20 Am. and Eng. Enc. Law (2 Ed.), 690. And so are locations upon forest or park reserves. *U. S. v. Gear*, 3 How. 120; *Wilcox v. Jackson*, 18 Pet. 498; *U. S. v. Tygh Valley Land Co.*, 76 Fed. Rep. 698; 20 Am. & Eng. Enc. Law (2 Ed.), p. 690.

<sup>1</sup> *Wade's Amer. Mining Laws*, p. 17; *Mor. Min. Rts.* (10 Ed.) 186, *et sub.*

<sup>2</sup> R. S. U. S., § 2324. Under Rev. St. U. S., § 2324, permitting miners of each mining district to make regulations, not in conflict with the laws of the United States, etc., governing the amount of work necessary to hold possession of a mining claim, and providing that, until a patent has been issued therefor, not less than \$100 worth of labor shall be performed during each year, 20 days' work, which according to an arbitrary rate allowed therefor by a regulation of a local mining association, would amount to \$100, is insufficient to hold a mining claim for one year, unless such work is really worth \$100. *Woody et al. v. Barnard et al.* (Supreme Court of Arkansas, Oct. 26, 1901), 65 S. W. Rep. 100. The court, in above case, quotes from *Bradley v. Lee* (Cal.) as to the effect of local rules, on character of work, as follows: "The true interpretation of the mining usage in the county of Nevada is that work to the value of one hundred dollars, or twenty days of faithful labor performed



provides that there shall be not less than one hundred dollars' worth of labor performed, or improvements made during each year upon lode claims, located upon the public land, but this requirement is intended more to show the good faith of the owner in the location of his claim, than as a limitation upon the power of State legislatures to impose other burdens upon the locator for the development of the mineral resources of the different States, and in the absence of necessary legislation by Congress, as one of the conditions of the sale, the local legislatures of the different States may provide other additional rules for the working and development of mining claims, which are not in conflict with the above provision of the United States statute.<sup>1</sup>

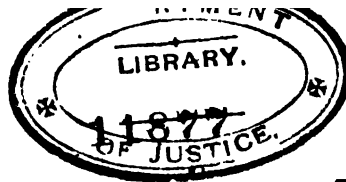
§ 49. **Character of work necessary.** — The courts are very liberal in their construction of the statute requiring a certain amount of labor performed or money expended by the locator of claims on the public land, and almost any kind of work performed for mining purposes upon the claim is held sufficient.<sup>2</sup> The work and expenditures required by the statute upon such claims may either be made upon the surface of the soil, or in running drifts or tunnels for the development of the claim,<sup>3</sup> and if the work is performed

on a claim, or on any one of a set of adjoining and contiguous claims owned by the same party, is sufficient to hold the same for one year," and the court hold that the Bradley case did not attempt to say that local rules could contravene the statute. See *Bradley v. Lee*, 88 Cal. 862.

<sup>1</sup> *Wade Amer. Min. Laws*, pp. 23-24. R. S. U. S., § 2338. State may pass supplemental acts, so far as the prerequisites to a valid location is concerned. *Copper Globe Min. Co. v. Allman* (Utah, 1901), 64 Pac. Rep. 1019. But where local regulation contravenes manifest intent of Federal act, it must give way. *Emerson v. McWhirter*, 133 Cal. 510; 65 Pac. Rep. 1086; *Wright v. Killian*, 132 Cal. 56; *Cleary v. Skiffith* (Colo.), 65 Pac. Rep. 59; *Mor. Min. Rts.* (10 Ed.) *supra*.

<sup>2</sup> *Wade Amer. Min. Laws*, *supra*. But it must be for mining purposes. *Moxon v. Williamson*, 2 Mont. 421; *Mor. Min. Rts.* (10 Ed.), Chap. II. *et sub*.

<sup>3</sup> R. S. U. S., § 2324; *Wade Amer. Min. Laws*, p. 17.



§ 50 RIGHTS OF INDIVIDUALS MINING ON U. S. LANDS. 75

within the time prescribed by the statute, or the money expended of an amount sufficient for the character of the claim, the original location will not be allowed to lapse or forfeit on account of the kind of work performed.<sup>1</sup> But although any kind of work for mining purposes is held a sufficient compliance with the statute, provided the amount of work performed is sufficient to hold the claim, still it is necessary that the work should be performed in good faith and for the actual development of the locator's claim, and if the work is done for other than mining purposes, or the expenditures are not made for the actual development of the claim, by such work and expenditures, the locator will not acquire any right as against the government to such land as a mining claim.<sup>2</sup>

§ 50. Same — When owned by several claimants. — When there are several owners of a vein or lode which has not been entered, each of the several co-owners can contribute his proportion of the expense necessary to hold such claim in common ownership, and where a number of such claims are held in common, upon the same vein or lode, the aggregate work and labor, or expenditures neces-

<sup>1</sup> "Labor by the owner of a mine in constructing a wagon road thereto, for the purpose of developing and operating the mine, is a sufficient compliance with the law requiring annual assessment work." *Doherty v. Morris* (Colo.), 28 Pac. 85.

<sup>2</sup> *Honaker v. Martin*, 11 Mont. 91; 27 Pac. 397. "But labor of sufficient value done on a quartz lode mining claim within a given year is sufficient without its being paid for, under Mont. Comp. Stat., div. 5, § 1488, requiring the owner of such claim to perform a certain amount of work each year, and providing for the filing of an affidavit showing, among other things, 'the actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said quartz claim,' as these provisions relate, not to the effect of doing the work or making the improvements, but are intended to provide a convenient method of preserving *prima facie* evidence of such labor and improvements." *Coleman v. Curtis* (Mont.), 30 Pac. 266.

sary to hold all the claims, may be performed or expended upon any one of the claims so located,<sup>1</sup> but in either case, if any one of the several co-owners fails to contribute his proportion of the expenditures necessary for holding the claim, those who have performed the work or made such expenditures may take and appropriate the interest of the party failing to contribute his proportion of the expenses, and divide such interest between the remaining co-owners<sup>2</sup> who have made the expenditures, or performed the work and labor required by law for holding the claim.<sup>3</sup> But before the delinquent co-owner could be deprived of his interest in the claim for failure to perform his portion of the work and labor necessary to hold the claim, the law requires that he be given a certain number of days' notice of the intention of the remaining co-owners to appropriate his interest in the claim toward defraying the expenditures required to be made, and if he should perform his portion of the work and labor, or contribute his share of the expenses before the termination of the period of publica-

<sup>1</sup> Wade Amer. Min. Laws, p. 198, *et sub.*; Mor. Min. Rts. (10 Ed.), Chap. IV., *et sub.*

<sup>2</sup> Mor. Min. Rts. *supra*. Wade Amer. Min. Laws, p. 16. Act Cong. 1872, Ch. 152, § 5, provides: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

<sup>3</sup> *Ante, idem*. "But the right to acquire by forfeiture, under Rev. St., § 2324, the part interest of one who fails to pay his proportion of the expenditure for annual labor, exists only in favor of one who is a co-owner in the year for which such labor is performed." *Turner v. Sawyer* (U. S. S. C.), 14 S. C. Rep. 192; 38 C. L. J. (No. 6) 183.

tion, he cannot then be deprived of his interest in the claim.<sup>1</sup>

§ 51. **When annual labor should commence.**— Prior to May 10, 1872, the amount of work and expenditure of money necessary to perfect a location was governed entirely by local rules and legislation, but at that date these rules were, in substance, formulated into an Act of Congress.<sup>2</sup> By this act the amount of assessment work commenced at the date of the location and the work performed by the discoverer prior to the performance of all the acts necessary to complete his location, were considered and allowed as a portion of the first year's work.<sup>3</sup> By the amendment of 1880,<sup>4</sup> however, the first day of the year after the location was fixed as the date at which the annual assessment work should commence, the work of the discoverer looking to the completion of the location being necessarily excluded as part of the first year's work.<sup>5</sup> But where no specific time is fixed as the date for the commencement of annual labor, if the same is to be performed within the year, the time will begin to run from the date of the location and the locator's rights to his claim could not be declared forfeited until he had failed to work his claim for one year from the date of location.<sup>6</sup>

<sup>1</sup> Mor. Min. Rts., *supra*; Wade Amer. Min. Law, *supra*.

<sup>2</sup> R. S. U. S. 2324; Wade Amer. Min. Laws, p. 52.

<sup>3</sup> *Ante, idem*; Mor. Min. Rts. (10 Ed.), Chap. 10.

<sup>4</sup> Act of Congress, Jan. 22, 1880, § 2.

<sup>5</sup> Wade's Amer. Min. Laws, p. 53, § 29, where this act is considered and construed according to author's ideas.

<sup>6</sup> Chapman v. Toy Long, 4 Saw. 35; Atkins v. Hendree, 1 Idaho, 108. "By the district rules the amount of labor was, I believe, generally fixed according to value, and in some districts the value of a certain amount of labor was arbitrarily fixed by rule; a rule requiring two days' labor in one year, was found to be the only labor requirement in one case." Wade's Amer. Min. Laws, p. 53, § 29; Leet v. John Dore S. M. Co., 6 Nev. 218. "What amount of labor would amount to \$100.00 on a claim, is

§ 52. **How long work should continue.**—The annual assessment work provided for by the statute<sup>1</sup> is annexed as a condition, in the nature of a condition precedent to the vesting of the title, of public land, to those operating the same for mining purposes. Until the location is perfected and the application for a patent is complete the locator subjects his claim to a forfeiture for a failure to perform the annual work and labor required by the law.<sup>2</sup> But after the performance of all the acts necessary to a complete location and pending the decision upon the application for a patent, if the locator has paid the purchase money and obtained a certificate of entry, he is not required to continue the annual expenditure required by the statute, but is then excused from its terms.<sup>3</sup> The patent, when issued, would relate back to the date of the completion of the location, and payment of the purchase money would give to the locator a vested right to a patent for his claim. Hence, the certificate of entry, as evidence of the payment of the purchase money, clothes him with sufficient muniments of title and makes him so far the proprietor of the land as to enable him to work the same or not, at his pleasure.<sup>4</sup>

of course a question of fact to be determined by evidence, and will be found to vary in different localities." Wade p., 55, § 29, and cases cited. "The statute now in force was the first Act of Congress requiring annual labor, or 'assessment work,' as it is commonly called, as a condition of holding mining claims on the public domain. It provides for two classes of claims: (1) those located prior to May 10, 1872, and (2) those located subsequent to May 10, 1872. The first requires \$10 worth of work to each 100 feet, and the latter \$100 worth of work to each claim regardless of size." *Ante, idem.*

<sup>1</sup> R. S. U. S., § 2324.

<sup>2</sup> Act Cong., Jan. 22, 1880, § 5.

<sup>3</sup> *Aurora Hill Con. Min. Co. v. Eighty-five Min. Co.* (C. C. D. Nev.), 34 Fed. Rep. 515.

<sup>4</sup> *Stork v. Storrs*, 6 Wall. 402; *Lessieur v. Price*, 12 How. 74; *Gibson v. Chouteau*, 13 Wall. 72; *Wade's Amer. Min. Law*, p. 55; *Aurora Hill Con. Min. Co. v. Eighty-five Min. Co.* (C. C. D. Nev.), 34 Fed. Rep.

§ 53. **Forfeiture for failure to work.** — If the owner of a mining claim fails to perform the necessary work and labor required by law in order to perfect his location, such failure may amount to a forfeiture of his rights;<sup>1</sup> but before a failure to perform work and labor, or to make the improvements required by law, can work a forfeiture of the locator's rights, it must be established by clear and convincing proof that the original locator failed to perform the work and labor, or make expenditures to the amount required by the statute.<sup>2</sup> As to the sufficiency of the work and labor performed upon the claim, the certificate of the United States surveyor-general must be taken as conclusive, unless corrected by the land department before a patent has issued to the claim;<sup>3</sup> but if the claimant has made fraudulent representations in regard to the amount of work and labor performed, for the purpose of obtaining a patent to the same, the certificate of the surveyor-general would not be conclusive as to the amount of labor and improvements on the claim, and if the delinquent owner failed to make the necessary expenditures within the time allowed by law, his failure to perform the work and labor required would operate as a forfeiture of his claim.<sup>4</sup>

515; *Heydenfeld v. Doney M. Co.*, 93 U. S. 641 (affirming *s. c.* 10 Nev. 290). See also *Courchaine v. Bullion Min. Co.*, 4 Nev. 376.

<sup>1</sup> *Morgan v. Tillottson*, 73 Cal. 520 (15 Pac. 88). "And a failure to comply with the Colorado statutes requiring the annual assessment work upon a mining claim is not excused by the fact that one of several joint owners of a claim promised the others that he would perform the work, and failed to do so; and such agreement between the parties cannot prejudice the rights of a third person making a valid relocation." *Doherty v. Morris*, 11 Colo. 12; 16 Pac. Rep. 911.

<sup>2</sup> *Hammer v. Garfield Min. & M. Co.*, 130 U. S. 291 (32 L. Ed. 964); 9 Sup. Ct. Rep. 548.

<sup>3</sup> *United States v. King*, 9 Mont. 75; *United States v. Iron-Silver Min. Co.*, 128 U. S. 673; (32 L. Ed. 571); 9 Sup. Ct. Rep. 195.

<sup>4</sup> *United States v. King*, *supra*.

§ 54. **Saved by work after failure.**— The United States statute provides that a locator can prevent a forfeiture of his claim, resulting from a failure to perform the work and labor required by the statute, provided the original locator or his representatives, resume work upon the claim after such failure and before a subsequent relocation of the same.<sup>1</sup> Hence, the fact that the locator has failed for the period of one year to perform the work and labor required by Act of Congress, will not, of itself, work a forfeiture of his claim, if he resumes the work, in good faith, before the claim has been relocated by others.<sup>2</sup> But a resumption of work, after a failure to perform the same in accordance with the provisions of the statute,<sup>3</sup> in order to save a forfeiture of the claim, and prevent a relocation by others, must be performed in honesty and good faith and not simply labor showing an intention to assert a claim to the property.<sup>4</sup> Nor would a failure to comply with the statute and perform the work required thereunder, be excused by the fact, that one of several joint owners of the claim had promised the others that he would perform the work and make the expenditures required by law and subsequently failed to do so, the others depending on him to perform his contract and for this reason failing to work the claim; for although the agreement could be enforced, as against the original parties thereto, it could not operate to prejudice

<sup>1</sup> Act of Congress, May 10, 1872, Ch. 152, § 5; Wade Amer. Min. Laws, p. 16, § 12. "And this resumption may take place at any time after the lapse of successive years in which such failure has occurred, with like effect as though the claimant had failed for but a single year, provided the claim was not abandoned." Wade Amer. Min. Laws, p. 58.

<sup>2</sup> Lacey v. Woodward (N. M.), 25 Pac. Rep. 785. "And the original locator's resumption of work upon a claim which has become subject to relocation, after notice of relocation posted, but before the relocater has marked his boundaries, is sufficient to prevent the lapse of the original location." Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70.

<sup>3</sup> U. S. Rev. Sta., § 2324.

<sup>4</sup> Honaker v. Martin, 11 Mont. 91; 27 Pac. Rep. 397.

the rights of a third party, making a valid relocation of the same claim.<sup>1</sup>

§ 55. Same — Other circumstances excusing forfeiture. — The legislature, in prescribing the act providing for forfeiture for a failure to perform the annual amount of assessment work contemplated by the statute, liberally permitted the locator to redeem his claim by performing the work before intervening rights had attached to the claim and if this had not been done the courts would perhaps have been equally liberal with the delinquent owner, on account of the odium attaching to all kinds of forfeitures.<sup>2</sup> The courts have held that the locator would be excused from performing his annual amount of work and labor when circumstances existed which rendered it impossible for him to do so, and this is certainly in accordance with principles of equity. A locator could not be said to have abandoned his claim if the same were seized by another, who continued to hold exclusive and adverse possession of the same and as the locator could not recover possession of his claim, he would not be held to forfeit the same for a failure to do the required assessment work, during the time of such adverse possession.<sup>3</sup> Nor would a locator be held to forfeit his entire claim, where he had only failed to work a portion of the same; but in case of a dispute as to a portion of his claim, he would have a perfect right to abandon such portion of his claim as may be in dispute, without forfeiting any rights he may have to the residue of his claim.<sup>4</sup>

<sup>1</sup> *Doherty v. Morris*, 11 Colo. 12; 16 Pac. Rep. 911.

<sup>2</sup> *Wade Amer. Min. Law*, pp. 56-202; *Mor. Min. Rts.* (10 Ed.) 186, *et sub.*

<sup>3</sup> *Utah Min. & Mfg. Co. v. Dickert and M. Sulphur Co.* (Utah), 21 Pac. Rep. 1002.

<sup>4</sup> *Lyler Min. Co. v. Last Chance Min. Co.* (C. C. App. 9 Ct.), 7 U. S. App. 463; 54 Fed. Rep. 284.



§ 56. **Relocation after forfeiture.**— After a claim has been forfeited for a failure to perform the work required by the statute, it can be relocated *the same as though no location of the same had ever been made*.<sup>1</sup> All the acts of location necessary on the part of the original locator must be performed by the relocater.<sup>2</sup> But after a relocation of the claim has been completed by a third party, after failure of the original locator to perform the work and labor required by the statute, and before a resumption of work by him, the rights of the original locator would be forever barred by his previous failure,<sup>3</sup> nor could he make a relocation of the claim, for the purpose of correcting an error in his original location and thus prejudice the rights of the intervening relocater.<sup>4</sup> But a relocation, however regular in form, would be of no effect if the original location was valid and the locator had kept it so by complying with the law,<sup>5</sup> for although the claim could be relocated after a failure by the original locator to perform the annual amount of work required by statute,<sup>6</sup> until the original locator's rights have been abandoned, forfeited, or otherwise ended, or as long as he retains the legal possession of the land, another could not make a valid relocation of the same.<sup>7</sup>

<sup>1</sup> R. S. U. S., § 2324.

<sup>2</sup> *Strong v. Ryan*, 46 Cal. 33; *Cheesman v. Shreve*, 40 Fed. Rep. 787.

<sup>3</sup> *Wade's Amer. Min. Laws*, § 31, p. 57; *Mor. Min. Rts.* (10 Ed.) 284, *et sub.*

<sup>4</sup> *Hall v. Arnott*, 80 Cal. 348; 22 Pac. Rep. 200; *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 329; *Wolfley v. Lebanon Min. Co.*, 4 Colo. 112. Nor would a conspiracy between part of the co-owners to let the claim lapse avail the others, as against such relocater. *Doherty v. Morris*, 11 Colo. 12.

<sup>5</sup> *Garthe v. Hart*, 73 Cal. 541; 15 Pac. Rep. 93.

<sup>6</sup> *Morgan v. Tillotson*, 73 Cal. 520; 15 Pac. Rep. 88.

<sup>7</sup> *Lockhart v. Rollins*, 34 Fed. Rep. 515; 21 Pac. Rep. 413. "Under the Colorado statute, in order to relocate an abandoned lode claim it is necessary either to sink a new discovery shaft or deepen the old one, to fix new boundaries or adopt the old ones, to renew the

§ 57. Same — By one of several co-owners. — After a claim has been forfeited for a failure to perform the usual amount of assessment work, one of several co-owners can relocate the claim in his own name and appropriate the interest of his cotenants in the abandoned claim.<sup>1</sup> This follows as a natural consequence from the effect of the statute, leaving the claim after forfeiture in the same condition as though no location had been made.<sup>2</sup> Any one or all of the co-owners should have the same right to relocate the claim that a stranger could exercise in regard to the same claim, nor is there any just cause why a relocation by one cotenant should inure to the benefit of all, after they had voluntarily lost their rights by a failure to comply with the statute.<sup>3</sup> But if the forfeiture should occur in

boundary post, to erect a new location stake, and to state in the certificate that the location is made in whole or in part as abandoned property; and a valid relocation is not made by the mere surveying, staking, and certifying of a previously located, overlapping claim." *Amor v. Soper*. 11 Colo. 380; 7 Am. St. Rep. 246; 18 Pac. Rep. 448. "*Prima facie* evidence of the location of a mine by the grantor of the one in possession is sufficient to justify a verdict against one who, knowing of such location, relocated it on the claim that was abandoned." *Yreka Min. & Mill. Co. v. Knight* (Cal.), 65 Pac. Rep. 1091.

<sup>1</sup> *Strong v. Ryan*, 46 Cal. 36, considered and discussed by Mr. Wade in Wade's Amer. Min. Laws, p. 58, § 82.

<sup>2</sup> R. S. U. S., § 2324.

<sup>3</sup> Mr. Wade criticises the holding in *Strong v. Ryan*, *supra*, and characterizes, the same as "*questionable*" law, whereas it seems but a reasonable interpretation of the statute as applied to the rights of the parties, in that case, and for this reason very "*wholesome*" law. The rights of the parties terminate *ipso facto*, with an abandonment of the claim or a failure to perform the statutory labor; nor would it be right, if one of the co-owners, more industrious than the rest, saw fit to relocate the claim, to give the less vigilant the benefit of his labor. The provision of the statute giving co-owners a lien on the interest of a delinquent cotenant, for a failure to contribute his proportion of the expenditures is not at all inconsistent with the holding in this case, nor does it have any application after a forfeiture of the claim. So, on the whole, with due deference to Mr. Wade's opinion, we think the holding of the court should stand. (For Mr. Wade's criticism of this case, see his Amer. Min. Law, p. 58, § 82.)

the first instance through the negligence or fraud of one of the co-owners and it could be shown that his intention in letting the claim forfeit was to relocate the same in his own right, he would not be permitted to thus take advantage of his own wrong and defeat the rights of his cotenants by a subsequent relocation of the claim, but the same, when perfected, would inure to the benefit of his co-owners, equally with himself.<sup>1</sup>

<sup>1</sup> Wade Amer. Min. Law, *supra*; King v. Edwards, 1 Mont. 235; Strong v. Ryan, 46 Cal. 83; see also title Relocation, in Mor. Min. Rts. (10 Ed.) and cases cited.

## CHAPTER V.

### PATENTS TO MINING LANDS.

- SECTION 58.** Of the nature and effect of patents.
- 59. Rights acquired under certificate of entry.
  - 60. Date at which patent takes effect.
  - 61. Reservations and exceptions.
  - 62. What patent conveys.
  - 63. Who may be patentee.
  - 64. Void patent — Effect of.
  - 65. Patent obtained by fraud.
  - 66. Same — Estoppel.
  - 67. Mining claims on school lands.
  - 68. Contests between mining and town site patentees.

§ 58. Of the nature and effect of patents. — A patent is the formal deed of conveyance required by the general laws for the transfer of land when the title to the same is in the general government.<sup>1</sup> In the United States, Congress alone has power to dispose of the public lands, either by general or special acts. The United States is the absolute and paramount owner of the public land, and could undoubtedly adopt any means of transferring the title, and any method adopted would be just as conclusive evidence of the irrevocable character of the conveyance;<sup>2</sup> but as the patent is the instrument adopted by the legislative authority for the transfer of the legal title to land held by the government, this instrument is correctly regarded as superior and conclusive evidence of legal title.<sup>3</sup>

<sup>1</sup> Tiedeman on R. P., § 745.

<sup>2</sup> Wade's Amer. Min. Laws, p. 92; Mor. Min. Rts. (10 Ed.) 113-123.

<sup>3</sup> *Ante, idem.* The statute is as follows: "§ 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of

The patent is signed by the President, or someone authorized to affix his signature, and sealed with the great seal of the United States; but it is not necessary that the

land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. (Act of Congress May 10, 1872, Ch. 152, § 6-) [That where the claimant for a patent is not a resident of the land district wherein the vein, lode, ledge or deposit, sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her or its authorized agent where said agent is conversant with the facts sought to be established by said affi-

grant should assume any particular form.<sup>1</sup> The proceeding necessary to obtain a patent to a mining claim is clearly defined by statute and has been already pointed out.<sup>2</sup> After the grant of a patent by the government the grantee acquires just as good a title to the land conveyed by the patent, as the government enjoyed before him, and no equitable rights could be successfully claimed adversely, to any portion of the land granted, as against the patentee of such land, unless the same rights could have been enforced as against the government.<sup>3</sup>

§ 59. **Rights acquired under certificate of entry.**—The certificate of entry vests but an imperfect legal title in the vendee, which is perfected by the execution and delivery of the patent. It vests an absolute right in the vendee to secure a patent for the land covered by the certificate, and after the certificate has been lawfully issued the same land cannot be subsequently sold to another.<sup>4</sup> It entitles the vendee to maintain the actions of trespass and ejectment against any one unlawfully entering, and the courts hold that the certificate of entry conveys sufficient title, whatever that may be, to enable the purchaser to convey the same before his death; and upon the death of the purchaser, before the execution of the patent, it descends to his heirs.<sup>5</sup> But the United States courts main-

tain: And *provided*, that this section shall apply to all applications now pending for patents to mineral lands. (Act of Congress Jan. 22, 1880, § 1.)]” Wade’s Am. Min. Laws, pp. 17 and 18; Mor. Min. Rts. (10 Ed.) 440.

<sup>1</sup> Tiedeman R. P., *supra*.

<sup>2</sup> The procedure to procure a patent is essentially a proceeding *in rem*. 420 Min. Co. v. Bullion Min. Co., 3 Saw. 659.

<sup>3</sup> Wade’s Amer. Min. Laws, p. 93. Patent cannot be assailed on ground that no ore was discovered prior to location. Calhoun Gold Min. Co. v. Ajax G. M. Co., 182 U. S. 499.

<sup>4</sup> Wade Amer. Min. Laws, pp. 14–15–35; Mor. Min. Rts. (10 Ed.) 406.

<sup>5</sup> “And a defective certificate would not defeat the right.” Wade

tain that the certificate of entry conveys but an equitable title, which is not sufficient to support a legal action.<sup>1</sup> This proposition does not prevent the purchaser, however, from maintaining the different actions for injuries to his possessory rights, acquired by the certificate, for the authorities are unanimous in holding the certificate of entry to entitle the purchaser to the absolute possession of the land.<sup>2</sup> It protects the holder, in this right, as against all the world, except the government or its grantee;<sup>3</sup> but where a patent is issued to one person, and another is entitled to the patent, by virtue of a prior entry and certificate, the rights of the patentee would be held in such a case to govern, for he holds the absolute legal title, and the same could not be set aside without a direct proceeding brought for that purpose, by the government, or the rightful owner in its name.<sup>4</sup>

§ 60. **Date at which patent takes effect.** — After the issuance of the certificate of entry, and a regular application for a patent, if the government price has been paid for the land, the purchaser acquires a vested right to the title to the land.<sup>5</sup> His title dates from the completion of his application for a patent, and from that time his position is equivalent to that of patentee,

Amer. Min. Laws, p. 232. Before patent granted, a receiver's receipt is *prima facie* evidence that applicant has complied with the law; thereafter the government is said to be a mere trustee of the title. *Sparks v. Peirce*, 115 U. S. 412; *Cornelius v. Kessel*, 128 U. S. 456; *Benson Co. v. Alta Co.*, 145 U. S. 428; 20 Am. & Eng. Enc. Law (2 Ed.), p. 765. But the court can cancel a receiver's receipt on proof that it was fraudulently obtained. *Parsons v. Venske*, 164 U. S. 89; *Pfund v. Valley L. & T. Co.*, 52 Neb. 473; see *Mor. Min. Rts.* (10 Ed.) 406.

<sup>1</sup> *Ante, idem.*

<sup>2</sup> *Wade Amer. Min. Law*, p. 232; *Copp's U. S. Min. Lands*, p. 436.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Tiedeman on R. P.*, § 746, and cases cited. See also Chap. *Adverse Claims and Contests*.

<sup>5</sup> *Wade Amer. Min. Law*, pp. 99, 100; *Mor. Min. Rts.* (10 Ed.) 358, 406.

for the obvious reason that the patent dates from the time when the application was complete, and would have the ultimate effect of cutting off all intervening rights to the premises covered by the patent.<sup>1</sup> The purchaser must first comply with all the provisions necessary for the procurement of a patent, and the government then holds itself ready for a performance of the contract. If the law were otherwise, the labors and expenditures of *bona fide* purchasers would be but inviting prey for the machinations of alert adventurers, who could perfect their premature claims pending the completion of the original application and the date of the issuance of the patent.<sup>2</sup> This rule, however, does not prevent a grantee of the patentee from asserting his rights under the patent, for a conveyance by the applicant for a patent, pending the completion of his application, would estop him from afterwards setting up a title to the land granted and the patent, when issued, would inure to the benefit of the original applicant's grantee.<sup>3</sup> It is maintained by some authorities that the doctrine regarding the effect of a patent, by relation to the time when the applicant is entitled to it under the law, is but a mere legal fiction, adopted by the courts for purposes

<sup>1</sup> *Heydenfeldt v. Daney Min. Co.*, 93 U. S. 641 (affirming *s. c.* 10 Nev. 290). "The patent of a mining claim granted under the acts of Congress perfects the right initiated by location, and relates back to the date of location, cutting off all intervening claims, except where the patentee has neglected to adverse the claim of an intervening or later location; in which case, under the provisions of said acts, such failure is a waiver of the priority." *Eureka Cons. M. Co. v. Richmond M. Co.*, 9 Cir. Ct. (Field, Sawyer and Hillyer, JJ.), 4 Sawyer. 317; M. M. D., 274. Patent relates to date of entry and location. *Lakin v. Dolly*, 53 Fed. Rep. 383; *Evans v. Durango L. & M. Co.*, 80 Fed. Rep. 433; *Last Chance Co. v. Tyler Co.*, 61 Fed. Rep. 557; *Jacob v. Lorenz*, 98 Cal. 332; *Silver Bow Co. v. Clark*, 5 Mont. 378; *Deno v. Griffin*, 20 Nev. 249; *Cahn v. Old Tel. M. Co.*, 2 Utah, 174; 20 Am. & Eng. Enc. Law (2 Ed.), 764.

<sup>2</sup> *Wade Amer. Min. Law*, pp. 100-110.

<sup>3</sup> *Landes v. Brant*, 10 How. 374; *Mor. Min. Rts.* (10 Ed.) 406.



of justice;<sup>1</sup> however this may be, the doctrine is very essential for the security and protection of those instituting proceedings for titles to government land, after the acquisition by the applicant of an equitable right to a title, and if fiction it be called, so long as laws are enacted for the purpose of protecting rights, the fiction should be supported by the courts.

§ 61. **Reservations and exceptions.**— In grants of public land where the land is entered and purchased for other than mining purposes the government frequently reserves the title to mineral lands included in the tracts granted. Where such reservations appear, the grant conveys no title to the land reserved and the title to such land remains in the government just as completely as if it had been set apart by special act of Congress.<sup>2</sup> But in order that such exceptions may become operative, it is not sufficient that mineral is discovered on the land, it must be discovered in quantities sufficient to render the land more valuable for mining purposes.<sup>3</sup> The terms exception and reservation are sometimes used synonymously, but there is a proper and practical distinction between the two that is recognized by the better authorities on the law of real property. An exception withdraws from the operation of a conveyance some part or parcel of the thing which is granted, and which but for the exception would have passed to the grantee under the general description; while a reservation is a new creation in behalf of the grantor of a right

<sup>1</sup> Tiede. R. P., Secs. 745, 746.

<sup>2</sup> Wade Amer. Min. Law, p. 94. "In ejectment against a defendant in possession of a portion of land described in the United States patent to a railroad, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant." *McLaughlin v. Powell*, 50 Cal. 64; M. M. D. 321.

<sup>3</sup> Wade Amer. Min. Law, p. 102. Under Rev. St., § 2392, only those mines which are known to exist at the time a town site patent is issued are excepted from its grant. *Larned v. Jenkins*, 113 Fed. Rep. 634.

issuing out of the thing granted which did not exist as an independent right before the grant.<sup>1</sup> From this distinction and a knowledge of the instrument, it will appear that provisions frequently occurring in grants of public land by which the title to certain portions of the land granted is retained by the government, is, technically speaking, an exception to the grant, rather than a reservation, which would amount to a new right issuing out of the tract granted.<sup>2</sup>

§ 62. What patent conveys. — A lawful patent creates an indefeasible estate in the patentee to the land covered by the patent, as well as the right to all fixtures and appurtenances on the land that would pass by ordinary conveyances of real estate.<sup>3</sup> It has been claimed that unless the land is entered by the patentee under the mining law, the title to minerals on the land would still remain in the government; but as the government's position in relation to the land granted is the same as that of any other proprietor,<sup>4</sup> the better doctrine undoubtedly is, that where public land is granted without reservation, no exception would be implied on the part of the government from the fact that the land contained valuable deposits of minerals.<sup>5</sup> Subject only to such reservations and exceptions as the law imposes, or the patent itself contains, the grantee of mining property takes the same title to the

<sup>1</sup> Tiede. R. P., § 843, *Ryckman v. Gillis*, 57 N. Y. 68; *Hudson Iron Co. v. Stockbuilders Iron Co.*, 107 Mass. 290.

<sup>2</sup> *Ante, idem.*; *Mor. Min. Rts.* (10 Ed.) 205.

<sup>3</sup> *Moore v. Snow*, 19 Cal. 200; B. & W. L. C. 52.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Boggs v. Merced Min. Co.* (a leading case), 14 Cal. 281. The decision of land department is final as to whether tract is mineral land or not, so that it can be so patented, unless Congress has given local courts power to pass upon the question. *Steele v. St. L. Smelt. Co.*, 106 U. S. 447; *Quinby v. Conlan*, 104 U. S. 426; *St. L. Smelt. Co. v. Kemp*, 104 U. S. 641; *Barden v. North Pac. Co.*, 154 U. S. 327; *Shepley v. Cowan*, 91 U. S. 320; 20 Am. and Eng. Enc. Law (2 Ed.), 764 *et sub.*

land as that acquired by other patentees, whether the land is entered as a mining claim or not.<sup>1</sup> But where the patent is obtained under the mining law, there are certain rights secured by the patentee which do not extend to ordinary grantees of public land on which mineral is subsequently found. The patent operates not only to pass the complete title to the land, but is also a confirmation of the locator's right under the location law, to follow the vein or lode on the dip, "where it enters adjoining ground between the parallel end lines of his claim."<sup>2</sup>

§ 63. **Who may be patentee.** — Generally speaking, anyone who could be considered a citizen of the United States, has the right, by a compliance with the proper legal proceedings, to acquire a patent to government land.<sup>3</sup> As the right is extended to those who are citizens of the United States, the test in determining when the right exists, is necessarily based upon the fact of citizenship.<sup>4</sup> The word "citizen," as used in different statutes, is subject to various constructions by the courts, in order to carry out the intention of the legislature in the different statutes where the word appears; but when the term is used in a benevolent statute, like the one we are now considering, in order to attain the object of the legislature, it is evident that a liberal construction should be placed upon the same.<sup>5</sup> The term applies alike to either sex,<sup>6</sup> and

<sup>1</sup> Moore v. Snow, 17 Cal. 200.

<sup>2</sup> Wade's Am. Min. Law, p. 103. But the patent does not give the patentee the right to follow the vein beyond the *side* lines of the land patented. Wolfly v. Lebanon Min. Co., 4 Colo. 112. See also St. L., M. & Co. v. Mont. M. Co., 56 L. R. A. 725.

<sup>3</sup> Wade Amer. Min. Law, pp. 101, 102.

<sup>4</sup> *Ante, idem.* But see Sec. 86, *ante*, and note, p. 57.

<sup>5</sup> *Ante, idem.*

<sup>6</sup> Unmarried women are included within the generic meaning of the term. Silver v. Ladd, 7 Wall. 219.

there is no doubt but what the female citizen is entitled to the equal benefit of the statute.<sup>1</sup> The right extends not only to persons who are citizens, but those who have declared their intention to become such are also entitled to the benefit of the statute and while it is not to be supposed that the simple declaration of intention by an alien, would entitle him to the benefit of the statute, so long as he remains an alien, such a person, after he has become a denizen of this country, or has obtained letters patent, *ex donatione leges*, which will ultimately make him a citizen, is undoubtedly entitled to the equal benefit of the statute with the natural born citizen and is fully capable, either by purchaser or devise, of acquiring title to public and private lands.<sup>2</sup> And these are not the only classes

<sup>1</sup> The word is construed as the term "man," when used in similar statutes; should be taken in its generic sense and should not abridge the rights of females to purchase mining claims upon the public land. *Silver v. Ladd, supra*.

<sup>2</sup> Wade Amer. Min. Law, p. 101. See also Mor. Min. Rts. (10 Ed.) 255, 257. "Act 1889 provided that all public lands containing valuable mineral deposits were reserved from sale to settlers, and open to purchase as prescribed by the act. Act 1895, § 1 (Rev. St. 1895, Art. 3498a), provided that all public lands specially included under the operation of the act, containing minerals, were reserved from sale, save as therein provided; and by section 2 (Rev. St. 1895, Art. 3498b) it is made the duty of the mineralogical survey to examine all public lands, and designate such as are mineral. Section 6 requires a locator applying for mineral land to make affidavit that he has discovered mineral. Section 10 provides that on the doing of certain things, on an application for mineral lands, the same shall be reserved from sale, and that any land of the State specified or included in section 1 may be so acquired. *Held*, that the statute not providing that the lands specially included were those designated by the geological survey, and it appearing from section 6 that other evidence of minerals than the result of such survey is to be submitted to the commissioner, and section 10 not referring to the lands open to application as those designated by survey, and making other provisions for reservation, save such designation, an applicant for mineral land (it being made to appear by evidence provided for in the statute that the land is mineral) is entitled to a patent, though the land has not been

who can acquire title to mining claims upon the public lands. Associations of persons, consisting of individuals who are citizens of this country, or who may have declared their intention to become such; persons belonging to either one or both of these classes, and corporations which have been organized under the laws of the United States, are also entitled to the benefit of the statute.<sup>1</sup>

§ 64. **Void patent — Effect of.** — An acceptance by the grantee is just as essential in a public grant as in the case of a private conveyance. The patentee must accept the patent after the same has been issued and if there is any existing disability which would render the applicant incompetent to perform this office the Secretary of the Interior has the power, any time before the delivery of the patent, to withdraw the application for the same.<sup>2</sup> If the applicant dies before the issuance of the patent the patent is just as ineffectual to pass the title to the deceased as the instrument of a private citizen would be.<sup>3</sup> At common law such conveyances, whether made by a private citizen or the general government, would be a nullity; the seisin would not pass and the title would remain in the grantor.<sup>4</sup> So far as individuals are concerned this rule of law is still the same; but in regard to grants by the general government, the rule has been changed by special statute and in such cases the title enures to the benefit of the deceased patentee's heirs, to all intents and purposes as though the

designated by survey." *Colquitt-Tigner Min. Co., Limited, v. Rogan, Land Com'r*, 68 S. W. 154. (Supreme Court of Texas, May 12, 1902.)

<sup>1</sup> *Wade Amer. Min. Law, supra*. But the corporation must have been organized under the laws of the United States or some one of the States or Territories. *McKinley v. Wheeler*, 130 U. S. 630; *Dohl v. Copper Co.*, 132 U. S. 264; *Thomas v. Chisholm*, 13 Colo. 105; *Stem-Winder Co. v. Emma Co.*, 2 Idaho, 421; 20 *Am. & Eng. Enc. Law* (2d Ed.), 703.

<sup>2</sup> *McGuire v. Taylor*, 8 Wall. 360; *Wade Am. Min. Law*, p. 98.

<sup>3</sup> *Davenport v. Iowa*, 13 Wall. 418.

<sup>4</sup> *Tiede. R. P.*, § 812.

applicant had accepted the patent during life.<sup>1</sup> The executive must have the power to convey before the patent will operate as a legal conveyance and where the land conveyed has been reserved from sale by Act of Congress the transfer would be void in law and the patent could be set aside by the government.<sup>2</sup> But this could only be done by a direct proceeding for the purpose; the presumption would be in favor of the proper authority in the executive, and the patent could not be attacked or declared void in a collateral proceeding.<sup>3</sup>

§ 65. **Patent obtained by fraud.**—Where fraud is used on government officials in obtaining a patent to public land, equity will grant such relief as may be necessary to third parties having an interest in, or concerning the property so obtained.<sup>4</sup> This doctrine is well settled, both by the Supreme Court of the United States and by courts of general equity jurisdiction. The relief which the court may grant is governed largely by the discretion of the chancellor and may vary with the particular facts and circumstances of each individual case. In granting such relief the court is not bound to follow any fixed precedent, or observe any rule of law, except the general equitable doctrine that the relief should be consistent with the cause of action. It is not necessary that the patent should be set aside in order to grant complete relief from a fraudulently obtained patent, and where the party to whom the patent is issued is not equitably entitled to receive it, the court should decree a transfer of the property to the person entitled to it, and furnish complete relief to the

<sup>1</sup> Act Cong. May 20, 1836; *Mor. Min. Rts.* (10 Ed.) 406.

<sup>2</sup> *U. S. v. Stone*, 2 Wall. 525.

<sup>3</sup> *I. S. M. Co. v. Campbell*, 135 U. S. 286; *Rose v. Richmond Co.*, 17 Nev. 25; 20 Am. & Eng. Enc. Law (2d Ed.), 765. But void patent can be assailed collaterally. *Ante, idem*; *Davis v. Weibold*, 139 U. S. 509; *Champion Co. v. Con. Co.*, 75 Cal. 78.

<sup>4</sup> *Bernard v. Ashley*, 18 How. 44; *Mor. Min. Rts.* (10 Ed.) 121.

injured party by a judicial conveyance of the title.<sup>1</sup> But a party setting up fraud as a ground for avoiding the patent must himself have an interest in the land and the question could only be raised in a direct proceeding, brought for that purpose, by one possessing equities that could be enforced as against the government. In an ejectment suit the question as to whether the patent was procured by fraud, could not be set up, or raised by one collaterally, not possessing such equities.<sup>2</sup>

§ 66. **Same — Estoppel.** — The doctrine of fraud and estoppel are so closely allied that in obtaining relief from the one, the other enters as a material element, in protecting the rights of the injured party by preventing the wrong-doer from receiving the benefit accruing from his misconduct.<sup>3</sup> Especially is this true in the case of a fraudulent patent, whether fraud is used in obtaining the patent, or in depriving one of his rights resulting from a prior possession and improvement of the land.<sup>4</sup> Where the applicant for a patent stands by and sees another in possession of the land he seeks to acquire by his patent, and with knowledge of such occupancy acquiesces in the prior possession and expenditures of the adverse claimant, he would afterwards be estopped from asserting a title to the land as against such adverse holder.<sup>5</sup> But before prior possession will defeat the title under a subsequently acquired patent, the party in possession must not only bring knowledge of his possession home to the applicant for the patent, at the time of his acquiescence, and show that he was himself without the means of discovering the

<sup>1</sup> *Silver v. Ladd*, 7 Wall. 219-228; 24 L. C. P. Co. 188. The practice, in this case, was held to be to compel defendant to convey, or to appoint a commissioner to convey for him.

<sup>2</sup> *Moore v. Wilkinson*, 18 Cal. 478; *Boggs v. Min. Co.*, 14 *Id.* 279.

<sup>3</sup> *Boggs v. Merced Min. Co.*, 14 Cal. 279.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Chapman v. Fay Long*, 4 Saw. 28.

true state of the title, but he must also fix a fraudulent intent or culpable negligence on the applicant and prove that he was induced to remain in possession on account of the applicant's acquiescence, and that he will be injured by allowing his possession to be denied. But these facts are necessary to be proven in every case of fraud.<sup>1</sup> If the applicant for a patent deeds his interest in the land sought to be patented by a deed containing covenants of title, he is afterwards estopped from dispossessing his grantee; but where he only attempts to convey a possessory right, and covenants for a future estate in the land, conditioned on his acquisition of the same, he would not be estopped from setting up a future title, unless he acquired it direct from the government, and this rule would apply whether the patent had been applied for or not.<sup>2</sup>

§ 67. **Mining claim on school lands.** — Congress, at an early day, granted certain lands for school purposes to the different Western States,<sup>3</sup> reserving to the government the right to grant other lands in lieu thereof, in case such lands should subsequently be found rich in mineral deposits.<sup>4</sup> The courts, in construing such grants, have held, that the State, in accepting the land granted, consented to the reservation by Congress of the mineral lands, and took the grant subject to all the conditions and reservations annexed by Congress.<sup>5</sup> The government would have the right to dispose of such land, or change the terms of the grant, any time before a survey, and disposal by the State, and a government patent to a mining claim on school land, loca-

<sup>1</sup> Wade Amer. Min. Law, p. 95; *Chapman v. Fay Long*, 4 Saw. (U. S.) 28. But see *Atty.-Gen. v. Smith*, 31 Mich. 359.

<sup>2</sup> *Ante, idem.* But see, *Mor. Min. Rts.* (10 Ed.) 406.

<sup>3</sup> 14 U. S. Sta. 85-6, Sec. 5 (approved July 14, 1866).

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Higgins v. Houghton*, 25 Cal. 255; *Copp's U. S. Min. Dec.*, pp. 105-109; *Doll v. Meador*, 16 Cal. 296; *Van Valkenburg v. McCloud*, 21 Cal. 330; *Foley v. Harrison*, 15 How. 447.



ted prior to the survey of such land, would relate back to the original location and pass the title to such land as against an intervening patent from the State.<sup>1</sup> But where land is located under a State school warrant and a patent is issued, after a full compliance with the law, the patent is sufficient evidence that the land is not mineral land, within the meaning of the section reserving such land from sale, and the fact that mineral is subsequently discovered on the land conveyed, in sufficient quantities to justify the patentee to work the same, would not justify the court in finding such land to be mineral land, or in interfering with the vested rights acquired by the patent, for the fact whether the land contained mineral or not, should have been ascertained before the same was offered for sale.<sup>2</sup>

**§ 68. Contests between mining and town-site patentees.**— In conveyances of land under town-site patents the government does not convey any right or interest in the mines or minerals located upon the land granted, and as this exception is one required by law, it is impossible under the patent to a town-site, to acquire any interest in any mine or mining claim upon the lands so granted.<sup>3</sup> The

<sup>1</sup> *Heydenfeldt v. Doney G. & S. Min. Co.*, 10 Nev. 290; *Blanchard & Weeks Lead. Cases*, p. 656.

<sup>2</sup> *Ah Yew v. Choate*, 24 Cal. 562. "After the title has passed from the government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties. If it appear that the party claiming the equity has established his right to the land to the satisfaction of the Land Department, in the true construction of the acts of Congress, but that by an erroneous construction, the patent has been issued to another, the court will correct the mistake. (*Minnesota v. Batchelder*, 1 Wallace, 109; *Silver v. Ladd*, 7 Wallace, 219)." *B. & W. L. C.* 311. See *People v. Morrill*, 26 Cal. 337. See *Adverse Claims and Contests*.

<sup>3</sup> *Butte City Smokehouse Lode Cases*, 6 Mont. 397; *King v. Thomas*, 6 Mont. 409. "Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extra-lateral rights, over claims whose surface lines conflict therewith."

owner of a mining claim over which a town-site is extended is not bound to file an adverse claim to such of his land as is covered by the town-site patent, for his claim is expressly excepted by law, and such exception is usually inserted in town-site patents from their operation.<sup>1</sup> But one who claims title under a town-site patent to the surface ground of a mining claim, over which the town-site is extended, is not relieved by such town-site patent from the necessity of setting up his adverse claim, on notice of an application for a patent to the mining claim, and a failure to assert his claim before such patent is issued, would bar the claimant from doing so thereafter.<sup>2</sup> The rights of a patentee, under a prior mining patent, to the possession of the surface of the ground covered by his claim, cannot be defeated by one claiming under a subsequent town-site patent, by showing that he was in possession of the land previous to the location of the mining claim; nor can he show that the location of the claim upon which the patent was based was void by reason of the failure of the locator to observe the requirements of the local statutes, for such defects, if any existed, in the location, would be cured by the issuance of the patent.<sup>3</sup>

**Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.**, 114 Fed. Rep. 420.

<sup>1</sup> **Boggs v. Merced Co.**, 10 M. M. R. 384. Agricultural patent void as against pre-existent mining claim. **Gold Hill Co. v. Ish**, 11 M. M. R. 685.

<sup>2</sup> **Butte City Cases**, *supra*, 6 Mont. 409; **King v. Thomas**, *Id.*; **Baker v. King**, 14 M. M. R. 404.

<sup>3</sup> **Talbot v. King**, 6 Mont. 76. Nor could the patent be assailed, collaterally, for fraud. **Boggs v. Merced Co.**, 10 M. M. R. 384; **St. Louis Smelting Co. v. King**, 11 M. M. R. 673.

## CHAPTER VI.

### MINING RULES AND CUSTOMS.

- SECTION 69.** Mining customs on government land.
70. Same — Ratification by government.
  71. How far governed by State laws.
  72. Must be reasonable.
  73. Judicial recognition of rules and customs.
  74. Custom and usage distinguished.
  75. How rules and customs are established.
  76. Same — Best evidence of district rule.
  77. Same — General and special customs.
  78. Rule or custom must be still in force.
  79. Antiquity of custom not essential.
  80. How title is established under.
  81. Term "mineral" limited by.
  82. Form part of contracts.
  83. Will not justify deposit of tailings or refuse on adjacent land.
  84. Property in fixtures sometimes determined by.
  85. Right to surface support not dependent upon.
  86. How rules and customs are construed.
  87. Same — In cases of forfeiture.
  88. Relative value and conflict between rules and customs.
  89. Advantage of claiming under written rule.
  90. How to plead local rules and customs.

§ 69. Mining customs on government land. — The government reserves the title to precious metals and minerals on the public land, and since the government is the proprietor of such lands, no right or title can be claimed by a private individual, as to such public mining land, without the direct or implied consent of the government. The rights of such claimants were recognized in the districts where they were exercised and although in apparent conflict with the theory of absolute ownership by the government, the recognition of such rights is in consonance with the more liberal idea that the government holds land

for the interest of its individual citizens, rather than the benefit of its own patrimony. The mining customs of this country have been justly referred to as a part of the American common law.<sup>1</sup> They are also an apt illustration of the supreme power of the people to shape and control legislation by their conduct and their habits. Those rights, therefore, having been recognized by the people before there was any legislation on the subject, necessity compelled that the miners adopt certain rules for the government of their camp or district and to adjust the rights of adverse claimants to such property by appealing to the usages of the district where the dispute occurred, or the rules that had been adopted by the camp or district, as applicable to the question in dispute.<sup>2</sup>

§ 70. **Same — Ratification by the government.** — Congress recognized the possessory rights of individual claimants under these local rules and customs, by providing that no possessory action between persons, in any court of the United States, should be affected by the fact that the paramount title to the land was in the government.<sup>3</sup> \* \* \* But that the same was subject to the regulations prescribed by law, and the local rules and customs of miners in the district where the action is

<sup>1</sup> *King v. Edwards*, 1 Mont. 235. See interesting opinion of Justice Miller in *Mining Co. v. Keystone*, 102 U. S. 167, for history of the origin of Western rules and customs. See also Bar. & Adams on Mines and Min. in U. S., Chaps. 6 and 10.

<sup>2</sup> Mining rules and customs, however, were not wholly unknown, prior to the discovery of precious metals in the United States, but many of the local customs obtaining there had, ages before, been recognized and applied under similar conditions, in England. MacSwinney on Mines, Chap. 6. Congress has provided that: "The miners of each district may make regulations not in conflict with the laws of the United States or the laws of the State or Territory in which the district is situated, governing the location, etc," of claims upon the public land. R. S. U. S., Sec. 2324.

<sup>3</sup> See Secs. 2319, 2320 and 2324, R. S. U. S.

commenced.<sup>1</sup> Many matters were left by Congress to the custom of miners to be determined, and some that had been controlled by custom were formulated into laws by Congress;<sup>2</sup> and but for these provisions, conceding the right to the miners of public land, to settle their own disputes by local law, or custom, it is doubtful if they could be determined by other than Federal legislation, for the fact that the government owns the property upon which the right to mine is given, necessarily gives it the power to limit the terms and conditions upon which it is to be held and occupied.<sup>3</sup>

§ 71. **How far governed by State laws.** — While Congress has recognized the right of miners to determine by their local rules, the rights of conflicting claimants in possessory actions for the public mining land, it has never given them the authority to determine, in all cases, the rights of such claimants in regard to public land, but has limited, instead, the power conferred or recognized, by delegating to the several States the power to legislate and control the manner of mining on the public land.<sup>4</sup> For this reason it is very important to ascertain whether the local regulation is or is not in conflict with the statutes of the State, for as far as the power conferred is exercised by the

<sup>1</sup> Bar. & Adams on Mines, &c., Chap. X.; R. S. U. S. Sec. 2338.

<sup>2</sup> R. S. U. S. XXXII., Chap. 6; Act May 1st, 1872, R. S. 2318, reserves all mineral land.

<sup>3</sup> Mor. Min. Rts. (10 Ed.), p. 10. Mineral lands in Michigan, Wisconsin, Minnesota, Kansas, Missouri, Alabama and Oklahoma are patented as farming lands and excepted from the Acts of Congress, known as the "mineral land laws," so the mining customs of the West, except those applicable to the changed conditions and relations, would not apply in these States. R. S. U. S. 2345; 7 Sup. R. S. 104 (Act May 5, 1876); 1 Sup. R. S. 404 (Act March 3, 1883); 1 Sup. R. S. 929 (Act March 3, 1891).

<sup>4</sup> R. S. U. S., *supra*. A rule or custom which conflicts with statute is void. *Hammer v. Garfield Min. Co.*, 130 U. S. 291; *Thompson v. Spray*, 72 Cal. 528; *Eberle v. Carmicheal*, 8 N. M. 169; 20 Am. & Eng. Enc. Law (2d Ed.), 684.

legislatures of the different States, with the exception of rights already acquired by virtue of some rule, the statute of the State will govern the matter in dispute and take effect in utter abrogation of the local district rule.<sup>1</sup> But these rules are seldom found to be in conflict with the statute of the State, for the legislatures recognize the rights acquired thereunder and shape their legislation from the local rules and customs throughout the mining district.<sup>2</sup>

§ 72. **Must be reasonable.**—The courts will not only set aside a local mining rule to avoid a forfeiture or prevent a fraud, but they will also refuse to enforce a rule that would work too great a hardship on the employee or operator of a mine, or one that in its very nature is unreasonable or unfair.<sup>3</sup> Just when a rule will be considered unreasonable and unfair, however, is a matter of discretion with the court, and can only be determined by a reference to the circumstances and facts connected with the case to be decided. Regarding the privilege to work a mine as an ordinary revocable license, a rule which provides that the party working the mine should perform a certain amount of labor

<sup>1</sup> R. S. Ariz. (1887), Sec. 2349; Hills Ann. Laws Oreg. (1892), Sec. 3832; Gen. St. Wash., Secs. 2210 and 2213; Md. Laws (1888), Ch. 40, Secs. 1-3; Utah, 2 Comp. Laws (1888), Sec. 3472; Montana Code Civ. Proc. (1895), Sec. 1321.

<sup>2</sup> Wade's Amer. Min. Law, p. 72. Mexican customs were even upheld when contrary to statute, hence, the classification, "customs without law; contrary to law and according to law." *Van Schmidt v. Huntington*, 6 M. M. R. 284.

<sup>3</sup> *Beatty v. Gregory*, 9 M. M. R. 234. Custom must be uniform. *Flaherty v. Gwinn*, 1 Dak. 509; *Southern Cross M. Co. v. Europa Min. Co.*, 15 Nev. 388; 20 Am. & Eng. Enc. Law, 684. Must be reasonable. *Woodruff v. Gravel Co.*, 18 Fed. Rep. 753; *Lincoln v. Rodgers*, 1 Mont. 217; *MacSwinney on Mines*, p. 90. "However, when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom." *Salisbury v. Gladstone*, 9 H. L. C. 701, 702, per Lord Cranworth; *Warrick v. Queen's Coll. Oxford*, 6 Ch. 722.

in order to hold the same, is not unreasonable;<sup>1</sup> nor is a rule unreasonable which provides certain formalities to be complied with by the parties locating the claim, such as posting notices, etc.<sup>2</sup> But a rule would be unreasonable that provides for an indefinite extension of the power to mine, or if it contained other provisions in conflict with the lessor's right of property.<sup>3</sup>

§ 73. **Judicial recognition of rules and customs.**—These mining rules and customs, when not unreasonable, or in conflict with the principles of justice, have been generally recognized by the courts, and are held to limit the rights and determine the liabilities of conflicting claimants, as fully and completely as any positive rule or legislative act.<sup>4</sup> They govern in all cases where there is not a rule of positive law on the question in dispute, and their validity is not affected by the fact that there has been no previous ratification of the rule or custom by the courts.<sup>5</sup>

<sup>1</sup> *Stone v. Bumpus*, 4 M. M. R. 278.

<sup>2</sup> *Erhard v. Boaro*, 15 M. M. R. 473.

<sup>3</sup> *MacSwinney on Mines*, Chap. 5. Right to take sand from land of another cannot be justified by custom. *Gatewood's Case*, 6 Rep. 59; *Cro. Jac.* 152; *Blewett v. Treganning*, 3 A. & E. 554; 4 K. & J. 591. Nor can the right to take stone be so justified. *Constable v. Nicholson*, 14 C. B. (N. S.) 281; *Padwick v. Knight*, 7 Exch. 754; *Austin v. Amherst*, 7 Ch. D. 691; *Chilton v. Landon*, 7 Ch. D. 740; *Mellor v. Spateman*, 1 Wm. S. 620; *Rivers v. Adams*, 3 Exch. D. 364.

<sup>4</sup> *Mining Co. v. Keystone Co.*, 102 U. S. 167; *Dean of Ely v. Warren*, 4 M. M. R. 233; *Brown v. 49 Min. Co.*, 9 M. M. R. 600.

<sup>5</sup> *Ante, idem*. "It is not the province of the court to question the judgment of the owner of a claim, a local custom so to work, having been established." *Stone v. Bumpus*, 4 M. M. R. 278. The courts have recognized the validity of district rules in the following cases: *Jennison v. Kirk*, 98 U. S. 453; *Erhardt v. Boaro*, 113 U. S. 527; *Glacier Mt. Sil. Min. Co. v. Willis*, 127 U. S. 471; *Watervale Min. Co. v. Leach (Ariz.)*, 33 Pac. Rep. 418; *Johnson v. McLaughlin*, 1 Ariz. 493; *Rush v. French*, 25 Pac. 816; *Hess v. Winder*, 80 Cal. 349; *Harvey v. Ryan*, 42 Cal. 626; *Con. Rep. Mt. Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343; *Golden Fleece G. M. Co. v. Cable Con. Min. Co.*, 12 Nev. 312; 20 Am. & Eng. Enc. Law (2 Ed.), p. 684.

§ 74. **Custom and usage distinguished.** — Custom is defined to be “unwritten law, established by common consent and uniform practice, from time immemorial, having respect to the inhabitants of a particular place or district.”<sup>1</sup> Usage is said to be broader than custom, but is generally applied to some particular trade, governing the habit and course of dealing that are ordinarily observed by parties in that trade.<sup>2</sup> In order to constitute a usage a custom it must have existed from time immemorial;<sup>3</sup> but it is not necessary in establishing a usage that it should have existed immemorially, and it is recognized when established, if it is known, uniform, reasonable, and not contrary to law,<sup>4</sup> although they are sparingly applied by the courts, as rules of law, their chief office being to interpret the intention of the parties, and to ascertain the extent of their contracts and to explain the meaning of words and phrases arising from doubtful and equivocal implications.<sup>5</sup> As a general rule, neither a custom or usage, proved to exist at one place, can be introduced as evidence of the existence of such custom or usage in another place;<sup>6</sup> but where the question to be determined is the manner of conducting a particular branch of trade, evidence of a custom governing the manner of conducting that trade at another place, is admissible,<sup>7</sup> and a custom governing the rights of parties to share the profits of mines, in one place, has been ad-

<sup>1</sup> *MacSwinney Mines, etc.*, p. 90. This is common law custom; *Smith v. N. A. M. Co.*, 1 Nev. 423.

<sup>2</sup> *MacSwinney Mines, Quarries and Minerals*, p. 90.

<sup>3</sup> *Tyson v. Smith*, 9 A. & E. 421; *MacSwinney, supra*. “A custom gives a right local to a district or community; prescription is a right attaching to the person or to a particular estate.” *Perley v. Langley*, 7 N. H. 283; *B. & W. L. C.* 95; *M. M. D.* 63.

<sup>4</sup> 2 *Greenl. Evid.*, § 249. From this distinction it will be seen that mining customs are, technically speaking, but usages, *sub.*

<sup>5</sup> 2 *Greenl. Evid.* 249.

<sup>6</sup> *Greenl. Evid.* (Vol. 2), Sec. 250.

<sup>7</sup> *MacSwinney on Mines*, p. 93.



mitted in proof of the same right claimed in another place, the subject being the same.<sup>1</sup>

§ 75. **How rules and customs are established.** — Both customs and rules must be proven by evidence of facts, not mere speculative opinions; and by witnesses who have had frequent and actual experience of the usage or custom and do not speak from report alone. They must be examined as to the course of the particular trade, to which the custom is alleged to apply, and cannot be examined to show what is the law of that trade.<sup>2</sup> One witness alone is not sufficient to establish the existence of a custom or usage, of which all engaged in that trade are supposed to have notice;<sup>3</sup> but it has been held a particular usage or custom could be proved by parol evidence, even though founded on the laws or edicts of the country where it prevails.<sup>4</sup> No one is a competent witness to prove a local custom, stated on the record, who would derive a benefit from its establishment;<sup>5</sup> but when a local custom has once been established by a judgment, the judgment is competent evidence in all cases to establish the existence of the custom, although the parties to the action may be different.<sup>6</sup> The existence of a particular usage will also be

<sup>1</sup> Greenl. Evid., *supra*; MacSwinney, p. 93.

<sup>2</sup> MacSwinney on Mines, Chap. V.; Bar. & Adams Mines & Min. in U. S., p. 283.

<sup>3</sup> Wade's Amer. Min. Law, p. 71.

<sup>4</sup> Erhardt v. Board, 113 U. S. 527, per Justice Field; 2 Greenl., § 249, *et seq.* Custom must be proven to exist, like any other fact is proven. Parley's S. M. Co. v. Kerr, 130 U. S. 256; Doe v. Waterloo Min. Co. (C. C. A.), 70 Fed. Rep. 455; Sullivan v. Hense, 2 Colo. 424; Suessenbach v. Deadwood Bank, 5 Dakota, 477; Poujade v. Ryan, 21 Nev. 449; Marshall v. Harney Peak Tin Min. Co., 1 S. Dak. 350. But when once established they are presumed to continue. North Noonday Co. v. Orient Co., 6 Saw. (U. S.) 299; Ribordo v. Quang Pang Min. Co., 2 Idaho, 131; 20 Am. & Eng. Enc. Law (2 Ed.), 684.

<sup>5</sup> Greenl. on Evid., 2 Vol., § 249, *et seq.*

<sup>6</sup> *Ante, idem.*

judicially recognized, where its existence has formerly been established by a competent tribunal and if the existence of the same usage or custom is put in issue, after its existence has been proven in successive investigations, it will be taken judicial notice of by the courts and its existence recognized without further proof.<sup>1</sup>

§ 76. **Same — Best evidence of district rule.** — The existence of a district rule is a question of fact, to be established by evidence, like any other fact. A transcript of a record book in which rules have been kept, although copied by a competent officer, and certified to in his official capacity, is not the proper evidence to prove the existence of the disputed rule, by itself, for in such case the correctness of the transcript would have to be proven by evidence *aliunde*.<sup>2</sup> The book of records would itself be the best evidence to prove the existence of the rule, and if it appeared properly recorded in the book, it would, at least, be *prima facie* evidence that the rule had been adopted.<sup>3</sup> But where parol evidence has been admitted to prove the existence of a rule, it cannot be objected to on the ground that it is secondary evidence, after the production of the written rule itself, and even if objected to, the jury should take the two together, in making up their verdict.<sup>4</sup>

<sup>1</sup> 2 Greenl., § 249 *et sub*. "Custom must be (1) certain; (2) reasonable; (3) existing from time immemorial, and (4) continuous." *Tanistry's Case*, Davy's Rep. 28; *Tyson v. Smith*, 99 and E. 421. "A custom allowing strangers to enter upon lands of another, and mine for lead, locally called 'miners' right,' cannot be proved by the usage of a single mine, or the practice of a few persons." *Fuhr v. Dean*, 26 Mo. 116; *M. M. D.* 65.

<sup>2</sup> Greenl. Evid., Chap. II.

<sup>3</sup> *Ante, idem*. "The local record of a mining community is the best evidence of the rules and customs governing the community." *Campbell v. Rankin*, 99 U. S. 261; *Bar. & Adams on Mines in U. S.*, p. 284.

<sup>4</sup> *Wade's Amer. Min. Law*, p. 71. Where the existence of rule is established, the regularity of its enactment is immaterial; it is held to be sufficient that it exists. *Campbell v. Rankin*, 99 U. S. 261; *Pralus v.*

§ 77. **Same — General and special customs.** — In establishing the existence of a custom, the proper evidence should first be introduced to prove the existence of the custom as to the locality where the controversy arose, or the situation of the subject-matter of the action.<sup>1</sup> If there is no local custom to control the subject-matter of the action in the locality where the controversy occurred and the matter is controlled exclusively by general custom, then the proper evidence can be introduced to prove the existence of the general custom, and show its application to the matter in dispute.<sup>2</sup> But the existence of a general custom can only be proved by evidence tending to show its existence in the district where the controversy arose, and evidence is not admissible to establish a general custom by the proof of local customs, on the point, in other districts.<sup>3</sup>

§ 78. **Rule or custom must be still in force.** — If the question is put in issue, the party taking advantage of a written rule or custom, must show, not only that the rule had been adopted, or that the custom did exist, but also that the same is still in force.<sup>4</sup> The mere proof of the existence of a rule, would not offset a right ac-

*Pacific Gold M. Co.*, 35 Cal. 30; *Roberts v. Wilson*, 1 Utah, 292; *Golden Fleece Co. v. Cable & Co.*, 12 Nev. 812; 20 Am. & Eng. Enc. Law (2 Ed.), p. 686.

<sup>1</sup> *Wade's Amer. Min. Law*, Chap. I.; *Perley v. Langley*, 4 M. M. R. 235. Custom and prescription are distinguished in that the former gives a right local to a district or section; the latter to a particular person or estate. *Perley v. Langley*, *supra*; *Austin v. Amherst*, 7 Ch. D. 692; *Homer v. Chance*, 4 DeG., J. & S. 626.

<sup>2</sup> *Wade's Amer. Min. Law*, *supra*.

<sup>3</sup> *Dean of Ely v. Warren*, 4 M. M. R., 233; *Brown v. '49 and '56 Mining Co.*, 9 M. M. R. 600; *Ely v. Warren*, 2 Atk. 189. "But in the mining districts of Cornwall and Derbyshire, where the local customs prevail, evidence of what has taken place in one manor, may, it seems, be admitted for the purpose of explaining or showing the custom in another." *MacSwiney on Mines*, p. 93.

<sup>4</sup> *Wade's Amer. Min. Law*, *supra*; *Mor. Min. Rts.* (10 Ed.) 9.

quired before the rule had been adopted, or after it had been repealed, for these rules are neither retrospective or perpetual, and in order to enforce a right claimed by virtue of such a rule, it must be shown that the rule was still in force, at the time when the right was acquired.<sup>1</sup> But although a right cannot be supported under a rule, adopted after the acquisition of the right, evidence of the existence of a subsequent rule, going to prove the validity of the right claimed, if properly limited to the point in issue, is perfectly admissible to show the authority by which the right is claimed.<sup>2</sup>

§ 79. **Antiquity of mining custom not essential.** — In establishing a local custom it is not necessary to prove that it has existed from time immemorial or since the organization of the mining camp, or district to which the same pertains, for while, in some cases, this would be a very difficult thing to prove, if the value of such customs depended solely on their antiquity, they would frequently, in other cases, be of very little value. All that is necessary is to prove that it was in force when the right claimed by virtue of the custom was acquired; or that it existed prior to the date when the location was made, or the act, that it is intended to control, was performed.<sup>3</sup>

§ 80. **How title is established under.** — When a party claims a right or title under a local written rule, he must, ordinarily, show a substantial compliance with the provi-

<sup>1</sup> *Ante, idem.* But ordinarily a plea that acts were done in accordance with a rule or custom would be taken to refer to such as were in force at the date the right was claimed. *Smart v. Morton*, 13 M. M. R. 655.

<sup>2</sup> *Mor. Min. Rts.* (10 Ed.) v; *Wade's Amer. Min. Law, supra*; *Roach v. Gray*, 16 Cal. 683; *Table Mt. Co. v. Stranahan*, 31 Cal. 387.

<sup>3</sup> *Smith v. North Amer. Min. Co.*, 1 Nev. 423; *Table Mt. Co. v. Stranahan*, 20 Cal. 198; *Wade's Amer. Min. Law*, p. 17. But in England the custom must commence from time immemorial. *Tanistry's Case*, *Davys Rep.* 28; *Tyson v. Smith*, 9 A. & E. 421; *MacSwinney on Mines, etc.*, p. 90.

sions of the rule in question.<sup>1</sup> But the same strictness does not obtain in establishing a title under a local written rule, as the courts require under a legislative act, and if the claimant shows a substantial compliance with the provisions of the rule, his title will, ordinarily, be recognized by the courts.<sup>2</sup> And it has even been held a sufficient showing of title, although the location was not made in accordance with any written rule, to prove that there had been a general recognition of the party's claim throughout the district; but the recognition of the claimant's title was no doubt founded on a custom, prevailing in the camp.<sup>3</sup>

§ 81. Term "mineral" limited by. — The scope of the term *mineral* is often limited in its application, by local, existing customs, that except from the definition substances that would otherwise be clearly held to be minerals.<sup>4</sup> For instance, a reservation of minerals "of all and every description," has been held not to include clay and sand, where an immemorial custom is established for the use of same,<sup>5</sup> and a farm lease, excepting "minerals, sand, stone," etc., has been held not to prevent the tenant, under an existing custom, from using flint and other stone "got according to the custom."<sup>6</sup> But evidence of a custom, on the part of tenants, to dispose of one sort of mineral, would not, ordinarily, by analogy, be evidence of any right to take mineral not within the custom,<sup>7</sup> nor would a custom

<sup>1</sup> Mor. Min. Rts. (10 Ed.) 8; *Pralus v. Jefferson G. & S. M. Co.*, 34 Cal. 558.

<sup>2</sup> "A substantial compliance with mining customs, where good faith is shown, is sufficient." *Donahue v. Meister* (1891), 88 Cal. 121.

<sup>3</sup> Mor. Min. Rts. (10 Ed.) 8; *Wade's Amer. Min. Law.*, p. 19; *Stone v. Bumpus*, 4 M. M. R. 278; *Groppe v. King*, 4 Mont. 367.

<sup>4</sup> *Darvill v. Roper*, 3 Drew. 301; *Bell v. Willson*, 3 Dr. & Sm. 395; *Hext v. Gill*, 7 Ch. 705.

<sup>5</sup> *Tucker v. Linger*, 21 Ch. D. 36; *A. G. v. Mylchreest*, 4 App. Cas. 294.

<sup>6</sup> *Ante, idem.*

<sup>7</sup> *Winchester v. Knight*, 1 P. Wms. 406; *Parrot v. Palmer*, 3 M. & K. 687; *Rowe v. Brenton*, 3 M. & R. 363.

to cut timber, or commit other similar waste, justify an appropriation of mineral;<sup>1</sup> but the custom should relate to the specific right and property claimed.<sup>2</sup>

§ 82. **Form part of contracts.** — All contracts are made with reference to mining customs and they become as part and parcel of all contracts, as much as the local laws are interpolated into contracts by the courts.<sup>3</sup> But contracts made outside a mining district are not subject to the same rule, as there is no presumption that words in the agreement were used with reference to the meaning placed upon such terms by local custom.<sup>4</sup> And a custom cannot be established to abrogate the terms of a written contract, for a custom, when inconsistent with the terms of a special covenant, must give way to such specific agreement.<sup>5</sup>

§ 83. **Will not justify deposit of tailings or refuse on adjacent land.** — Neither custom nor necessity will permit one to so use his own to the injury of another's rights, as to justify a mine owner or operator to deposit the tailings or refuse from his mine upon the land of his neighbor to the injury of the latter's rights of property,<sup>6</sup> and no custom showing the exercise of such a wrong would be permitted to work a continuance thereof, for this would be contrary to the underlying principle of the maxim, *sic utere tuo ut alienum non laedas*.

§ 84. **Property in fixtures sometimes determined by.** — The property in fixtures, or improvements to carry on

<sup>1</sup> *Ante, idem*; *Anglesey v. Hatherton*, 10 M. & W. 218.

<sup>2</sup> *Portland v. Hill*, 2 Eq. 765; *MacSwiney Mines, etc.*, p. 101.

<sup>3</sup> *Beatty v. Gregory*, 9 M. M. R. 234.

<sup>4</sup> *Clayton v. Greyson*, 9 M. M. R. 141.

<sup>5</sup> *Shafts v. Johnson*, 15 M. M. R. 262.

<sup>6</sup> *Esmond v. Chew*, 15 Cal. 137; *Gregory v. Harris*, 43 Cal. 38; *McLaughlin v. Del. R.*, 16 Pac. 887; *Fuller v. Swan River Min. Co.*, 12 Colo. 12; *Lincoln v. Rodgers*, 1 Mont. 217. "The privilege of sending the tailings from the streaming down a natural water-course and over lands of other persons may be allowed by local custom." *Carlyon v. Lovering*, 40 Eng. L. & E. 418; M. M. D. 64.

mining operations, usually depends upon the character of the annexation and the intention of the parties, which usually finds expression in a written agreement.<sup>1</sup> The right of removal is always subject to special agreement, but may also be controlled by local custom or usage,<sup>2</sup> and where the disposition of such property is not the subject of a special contract, a local custom in the district may be established to control such disposition.<sup>3</sup>

**§ 85. Right to surface support not dependent upon.** — The mine owner who removes the subjacent support and thereby injures the surface owner, cannot justify such act upon a local rule or custom, for such a custom, if established, would be in utter disregard of the surface owner's right of property; contrary to existing laws and enlightened principles of equity and void.<sup>4</sup> But leaving the surface intact in its original condition is all the surface owner has a right to demand and the operations of the owner of the minerals, conducted in the customary manner, cannot be prevented because of resulting injuries to buildings on the surface.<sup>5</sup>

**§ 86. How rules and customs are construed.** — Great latitude is given the miners by the courts, in construing

<sup>1</sup> *Ewell on Fixtures*, p. 88; *Press Brick Co. v. Quarry Co.*, 151 Mo. 267.

<sup>2</sup> *Merritt v. Judd*, 6 M. M. R. 62.

<sup>3</sup> *Lowther v. Cavendish*, 1 Eden, 99; *Bain v. Brand*, 1 App. Cas. 762; *MacSwinney Mines*, p. 267.

<sup>4</sup> *Burgner v. Humphrey*, 41 Ohio, 340; *Carlin v. Chappel*, 101 Penn. 348; *Bermond v. Barnes*, 13 W. N. C. 541; *Erickson v. Mich. L. & I. Co.*, 50 Mich. 604; *Wilms v. Jess*, 94 Ill. 464. The right to surface support, however, may be disposed of by special covenant and where this is done the support may be wholly removed and surface owner is remediless. *Scranton v. Philipps*, 94 Pa. 15. But a grant of all mineral and right of removal will not be construed to part with right to surface support. *Burgner v. Humphrey*, 41 Ohio, 340.

<sup>5</sup> *Marvin v. Brewster Iron Co.*, 55 N. Y. 538. "And this rule applies, whether tenant is a lessee or licensee." *Offerman v. Starr*, 2 Penn. 394; *Traut v. McDonald*, 83 Pa. 144.

the validity of their local regulations, and no local rule that has been adopted by an expression from the miners will be held illegal by the courts, however irregular the proceedings may have been, if it appear that the same was agreed to by the miners and due notice of the time and place of meeting had been given.<sup>1</sup> If it is shown that the expression from the miners was obtained through fraud, this would of course invalidate the rule;<sup>2</sup> but no informality in the proceeding or failure to observe the customary usages of legislative bodies, will affect, in the least, the validity of the rule,<sup>3</sup> and when such rules are not unreasonable, but are in harmony with the laws of the State where they are in force, the courts will interpret them as they would a private statute, and having ascertained the object and meaning of the rule, will strictly carry out the intention of the miners.<sup>4</sup>

§ 87. *Same*—*In cases of forfeiture.*—The proceedings of the meeting at which the rules were adopted, are regarded of so little consequence by the courts that the alteration of one or more of the rules, even after they have been adopted and reduced to writing, will not invalidate the rules which are left unchanged.<sup>5</sup> But in regard to forfeitures, the courts are inclined to lean to a strict con-

<sup>1</sup> *Flaherty v. Gwinn*, 1 Dakota, 509; *Morton v. Salombro Copper Co.*, 26 Cal. 527. Mining customs may be proved, however recent their date or short their duration. *Smith v. North Amer. Min. Co.*, 1 Nev. 423.

<sup>2</sup> *MacSwinney on Mines*, p. 90; *Wade's Amer. Min. Law*, p. 21.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Fairbanks v. Woodhouse*, 6 Cal. 433; *Rosenthal v. Ines*, 2 Idaho, 244. Mining customs have been enforced in the following cases: *Jupiter Min. Co. v. Bodle & Co.*, 7 Saw. (U. S.) 96; *Watervale Min. Co. v. Leach* (Ariz.), 33 Pac. R. 418; *Titcomb v. Kirk*, 51 Cal. 288; *Gleeson v. Min. Co.*, 13 Nev. 442; *McCormick v. Varnes*, 2 Utah, 355; *Becker v. Pugh*, 9 Colo. 589; *Gropper v. King*, 4 Mont. 367; *Eberle v. Carmichael*, 8 N. M. 169; *Chambers v. Harrington*, 111 U. S. 350; 20 Am. & Eng. Enc. Law (2 Ed.), p. 686

<sup>5</sup> *Wade's Amer. Min. Law*, p. 22.



struction of the rule, and the regularity of the proceedings at which it was adopted. Forfeitures are always regarded with odium by the courts, and will generally be set aside in equity, when the damages resulting from the breach can be assessed and are capable of pecuniary compensation.<sup>1</sup> This rule of law is frequently avoided in mining leases, however, by construing the lease as an ordinary license, with a power of revocation in the licensor that can be exercised at any time after breach of the condition.<sup>2</sup> But a local regulation is always construed strictly against forfeitures, and if the same is capable of a double construction, the court would enforce the rule, if possible, in such manner as to obviate the necessity of a forfeiture.<sup>3</sup>

§ 88. **Relative value and conflicts between rules and customs.** — There is no difference in the value of a rule or local law and a custom or usage governing the same cause, when the existence of either is sought to be established by parol evidence and they will have equal effect in shaping the decision of the cause.<sup>4</sup> It would be inconsistent with the nature and origin of these rules and customs to make any distinction as to their value, for they both acquire their force and effect from the customary recognition and obedience by the miners of the district where they are in force and neither depends upon any special legislation nor do they owe their existence to statutory enactments.<sup>5</sup>

<sup>1</sup> See Chap. Forfeitures. "A right to hold a claim may be forfeited by failure to comply with the district rules. *St. John v. Kidd*, 4 M. R. 454. But not unless the rule itself so expressly provides." *Bell v. Bed Rock Co.*, 1 M. R. 45; *Mor. Min. Rts.* (10 Ed.), p. 9."

<sup>2</sup> See Chap. on Licenses to Mine.

<sup>3</sup> *McGarrity v. Byington*, 12 Cal. 426. "The attempted forfeiture is a void proceeding where his share of work has been in fact done by the cotenant alleged to be in default." *Brundy v. Mayfield*, 38 Pac. 1067; *Mor. Min. Rts.* (10 Ed.) 101.

<sup>4</sup> *Harvey v. Ryan*, 42 Cal. 626. But a custom generally observed and in effect will prevail over a law fallen into disuse. *Ante, idem.*

<sup>5</sup> *King v. Edwards*, 1 Mont. 235.

Therefore, where there is a conflict between a rule and custom, relating to the same cause, and either the one or the other is shown to have been discarded, the one still in force and recognized by the miners would of course control the matter in dispute.<sup>1</sup>

§ 89. **Advantage of claiming under written rule.** — While local rules and customs are placed upon an equal footing and both owe their continued existence to the usages of the miners in the district where they are in force, a party claiming under a written rule, in some respects has the advantage of one claiming under a local custom. This is due, principally, to the manner of proving the existence of the two, and the facility with which a written rule can be established.<sup>2</sup> A custom, in order for it to prevail throughout a district, must necessarily have existed for some little time, while a rule could be easily adopted at a single meeting of the miners of the camp or district, and since, in cases where the two conflict, the latter governs the matter in dispute,<sup>3</sup> a written rule, adopted at a meeting of the miners, although in conflict with a pre-existing custom, would control the decision of the court and abrogate the custom that had been in use.<sup>4</sup>

§ 90. **How to plead local rules and customs.** — It depends upon the code provisions and practice of the State where the local law or custom is in force whether it is necessary to specially plead the same and it has been decided differently in different States. But it would seem to be in harmony with the spirit and letter of the code, to permit a defendant to take advantage of a rule or local custom,

<sup>1</sup> *Harvey v. Ryan*, 42 Cal. 626; *Original Co. v. Winthrop Co.*, 60 Cal. 631; *Gleeson v. Martin White Min. Co.*, 13 Nev. 442.

<sup>2</sup> *Orr v. Haskell*, 2 Mont. 225; *English v. Johnson*, 17 Cal. 108; *B. & W. L. C.* 172.

<sup>3</sup> *Wade's Amer. Min. Law*, p. 19. But see *Table Mt. Co. v. Stranahan* (20 Cal. 198), and *Harvey v. Ryan* (42 *Id.* 626).

<sup>4</sup> *Wade's Am. Min. Law*, *supra*.

under the general denial, and not require the plaintiff to specially set forth the same in his complaint.<sup>1</sup> Issuable facts should alone be pleaded, under the provisions of the code, and if the plaintiff sets forth in his petition the right or title under which he claims, and shows other facts essential to his cause, it would not seem necessary for him to plead the rule or custom under which he acquired the same, for these are but evidential facts, which go to prove the existence of his right or title.<sup>2</sup> In Colorado it has been held unnecessary to specially plead a rule or custom to support the plaintiff's right or title,<sup>3</sup> but the same court held, in a later case,<sup>4</sup> that a defendant should specially plead a rule or custom, when he introduced the same to prove a forfeiture by the plaintiff in the cause, although abandonment could be proven under a general denial.

<sup>1</sup> *Coleman v. Clements*, 23 Cal. 245. Evidence of the existence of rules or customs is usually admissible, without pleading such rule or custom. *Jacob v. Day*, 111 Cal. 571; 44 Pac. Rep. 248.

<sup>2</sup> *Coleman v. Clements*, *supra*.

<sup>3</sup> *Sullivan v. Hense*, 2 Colo. 424.

<sup>4</sup> The reasons for the distinction can be seen in the opinion of the court. *Morenhout v. Wilson*, 1 M. M. R. 53; *Dutch Flat Co. v. Mooney*, 6 M. M. R. 303.

## CHAPTER VII.

### SALE AND CONVEYANCE OF MINING PROPERTY.

- SECTION** 91. Should be in writing.  
91a. Bill of sale sufficient.  
92. Shares in cost book companies.  
93. Sales by corporations.  
94. Of mines held in partnership.  
95. Doctrine of caveat emptor.  
95a. Buyer may remain silent.  
96. Mines forming part of inheritance.  
97. Reservation of mines and minerals.  
98. Dower attaches to.  
99. Sale by trustees.  
100. Sales by executors and administrators.  
101. Partition of mines.

§ 91. Should be in writing. — It has been claimed by eminent authority that a mere verbal sale of a mining claim on public land, accompanied by a delivery of possession, would constitute as good a sale of the claim so transferred, as if the transaction had been evidenced by an instrument in writing.<sup>1</sup>

<sup>1</sup> Wade Amer. Min. Law, p. 218, § 154. *Gore v. McBrayer*, 18 Cal. 582; *Table Mountain &c. Co. v. Stranahan*, 20 Cal. 198; *s. c.* 21 Cal. 548; *Gatewood v. McLaughlin*, 28 Cal. 178; *Antoine Co. v. Ridge Co.*, 28 Cal. 219; *Mining Co. v. Taylor*, 100 U. S. 87. But this would only apply where the claim was held by mere right of possession and in the absence of a local statute prescribing the mode of transfer. *Ante, idem.* *Clark v. McElroy*, 11 Cal. 155 (citing *Adams v. Cuddy*, 18 Pick. 463; *Morse v. Godfrey*, 8 Story, 364; *Dupont v. Wertheman*, 10 Cal. 354); *Waring v. Crow*, 11 Cal. 366. *Copp's Mineral Lands*, p. 411-413. "In *Table Mount. Tunnel Co. v. Stranahan*, 20 Cal. 198, a case arising before the Act of 1860 was passed (though not decided till afterward), it was considered that a conveyance by deed was not necessary to invest a party with the right to a mining claim. It was thought that a conveyance by deed would have passed no greater interest than that a party could acquire by a transfer of possession. The ground of the decision was that rights resting upon possession, and not amounting to an interest in the

This would seem in direct contradiction to the acknowledged meaning of the statute of frauds, for the minerals, before their severance from the soil, constitute a part and parcel of the realty,<sup>1</sup> and the owner's interest therein is clearly within the provision of the statute requiring sales and transfers of such interest, to be evidenced by some instrument in writing.<sup>2</sup> It is not claimed, however, that such an interest can be transferred verbally, without a transfer of possession,<sup>3</sup> but as the transfer of

*land*, were not within the statute of frauds, and no conveyance other than a transfer of possession was necessary to pass them. And accordingly, where a party was put in possession as the successor in interest of a mining company, and the intention undoubtedly was that whatever rights the company had should pass with the possession, and there was no reservation in that respect, it was held that the transfer was complete without any written conveyance. In *Gatewood v. McLaughlin*, 23 Cal. 178, the court held that a mining claim upon the public lands rested upon possession only, and a sale by parol by one in possession, accompanied by transfer of possession, was valid. *Table Mount Tunnel Co. v. Stranahan*, and *Jackson v. Feather River Water Co.* (*supra*) were affirmed." *Blanchard & Weeks Ld. Cas.*, p. 343; see also *Copper Hill Min. Co. v. Spencer*, 25 Cal. 18.

<sup>1</sup> *Bainbridge on Mines*, 3; *Gillett v. Treganza*, 6 Wis. 343; *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81; *Lyon v. Gormley*, 53 Pa. St. 261; *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Forbes v. Gracey*, 94 U. S. 762; *Copp's Min. Lands*, 192; *Manning v. Frazier*, 96 Ill. 279; *Carrhart v. Mont. Co.*, 1 Mont. 245; *Williams v. Gibson*, 84 Ala. 228; *Melton v. Lombard*, 51 Cal. 358.

<sup>2</sup> "Mines, whether considered as a part of the land itself or as forming distinct possessions and inheritances, are undoubtedly within the statute of frauds, and cannot be transferred by parol." *Bainb. on Mines*, p. 112; *Big Mt. Improvement Co.'s Appeal*, 54 Penn. 370; *Blanchard & Weeks Ld. Cas.*, p. 341, *et sub.*

<sup>3</sup> "In *Copper Hill Mining Company v. Spencer*, 25 Cal. 18, the court held that the rule which allowed mining claims to be transferred by verbal sale and delivery of possession, only applied to cases where the grantor was in the actual possession and could make delivery to the grantee, and did not extend to cases where, at the time of the sale, the claim was in the adverse possession of third parties, and in such cases there should be a written conveyance to pass the title." *B. & W. L. C.*, pp. 343 and 344. "Mining claims in Utah (by statute) are real estate, and pass by deed." *Houtz v. Gisborn*, 1 Utah, 173; *M. M. D.* 26. "A miner's

possession alone is not sufficient to take verbal sales of real estate out of the statute;<sup>1</sup> it is difficult to grasp the theory upon which this claim is based. Statutes have now been passed in most of the mining States, requiring such transfers to be evidenced by an instrument in writing;<sup>2</sup> but although the same reasons prevail for the requirement of such evidence in sales and transfers of mines as pertain to sales of other similar species of property,<sup>3</sup> the courts, except in rare instances,<sup>4</sup> have failed to regard such provisions as mandatory, but have leaned to a liberal construction of the statutes, requiring conveyances of mining claims to be in writing.<sup>5</sup>

§ 91a. *Bill of sale sufficient.* — Bills of sale have been held sufficient to transfer the interest of a claimant to a mining claim on public land.<sup>6</sup> A bill of sale is generally defined to be a record of the transaction in a sale of per-

claim, being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator." *Corbett v. Berryhill*, 29 Iowa, 157; M. M. D. 26.

<sup>1</sup> *Tiedeman on R. P.*, § 783, p. 602; 3 Washburn on R. P. 421, 422. A mining claim upon the public land is such an interest in real estate as to prevent its transfer by parol. *Moore v. Hammersley*, 109 Cal. 122; 41 Pac. Rep. 805. The right to a claim upon the public domain is property and may be sold and is subject to the law of descent, without affecting the title of the government. *Mannell v. Wulff*, 152 U. S. 505.

<sup>2</sup> *St. John v. Kidd*, 26 Cal. 269; *Goller v. Tett*, 30 Cal. 481; *Patterson v. Keystone Min. Co.*, 30 Cal. 360; 23 *Id.* 575; Statutes Cal., Act 1860, Statutes at Large.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Copper Hill Mining Co. v. Spencer*, 25 Cal. 18; *Wade's Amer. Min. Laws*, p. 219, § 164, and cases cited.

<sup>5</sup> *Wade's Amer. Min. Laws*, pp. 218 and 219; *Myers v. Tongerhorson*, 46 Cal. 190. "Where a mine owner gives an option to purchase his mines, he may withdraw such option at any time before its acceptance." *Snow v. Nelson* (U. S. C. C., D. Nev.), 115 Fed. Rep. 353.

<sup>6</sup> *St. John v. Kidd*, 26 Cal. 269; *Felger v. Coward*, 35 Cal. 650 (construing Act of 1860, p. 175). But see, *contra*, *Clark v. McElvey*, 11 Cal. 160, where bill of sale not under seal was held insufficient.

sonal property, transferring the title and possession of such property<sup>1</sup> and being in the nature of a receipt for the purchase money of the property sold, and furnishing evidence of the transfer and delivery of the property conveyed.<sup>2</sup> Generally, any article of personal property can be transferred by bill of sale that is capable of complete transfer by delivery.<sup>3</sup> Under the statute of frauds, however, chattel interests in real estate, fixtures and property forming a part of the realty, except property known as trade machinery and fixtures,<sup>4</sup> are not considered personal chattels.<sup>5</sup> But there is no provision of the statute, preventing the sale and transfer of such property under a valid bill of sale,<sup>6</sup> and hence the courts have held, that the sale of a mine, or mineral claim, will be sufficient if evidenced by a bill of sale.<sup>7</sup> No particular form of words is necessary in the bill of sale, in order to constitute a valid assignment of a mining claim,<sup>8</sup> but it must be clear, from the words used, that the maker intended to convey the title to the property;<sup>9</sup> but if this appear from the body of the instrument, the courts will construe the language used so as to effectuate the intention of the parties.<sup>10</sup>

§ 92. **Shares in cost book companies.** — Shares in cost book mining companies are held not to be such an interest in land as to bring the shares within the statute of frauds,

<sup>1</sup> Benjamin on Sales, p. 417 *et sub.*

<sup>2</sup> Benjamin on Sales, *supra*.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> Benjamin on Sales, pp. 98-118; Wade, § 153, p. 217.

<sup>5</sup> Benj. Sales, p. 98 and cases cited.

<sup>6</sup> Wade's Amer. Min. Laws, pp. 218-219.

<sup>7</sup> Myers v. Farquharson, 46 Cal. 190; see *supra*.

<sup>8</sup> *Ante, idem*; Wade's Amer. Min. Laws, § 154, pp. 219-220.

<sup>9</sup> Sullivan v. Heuse, 2 Colo. 424.

<sup>10</sup> Union Con. S. M. Co. v. Taylor, 10 U. S. 37; Am. & Eng. Enc. of Law, Vol. 15, p. 578; Kinney v. Con. Vir. M. Co., 4 Saw. (U. S.) 382.

and requiring the transfers of such shares to be evidenced by an instrument in writing.<sup>1</sup> The shares in such companies are held to represent a mere nominal interest in the company and not an interest in the land.<sup>2</sup> But shares of stock in cost book mining companies are not always to be regarded as personal property, and when the character of the property is put in issue, in the transfer of a shareholder's interest, the question to be determined, is whether the shareholder has individually an interest in the land, as land, or whether his shares represent a mere moneyed interest in the company.<sup>3</sup> If the interest is an interest in the land, as such, a conveyance of the same would come within the statute of frauds and, to be valid, would have to be evidenced by an instrument in writing;<sup>4</sup> while a mere verbal sale of a share, represented by a moneyed interest, would constitute a good conveyance of such shareholder's interest, whether the company was incorporated or not.<sup>5</sup>

§ 93. Sales by corporations. — The manner of disposing of corporate property, by mining corporations, is regulated

<sup>1</sup> *Watson v. Spratley*, 10 Ex. Ch. 222; *In re Wrysgan Slate Co.*, 28 L. J. Ch. 894; *Mayhew's Case*, 5 De G. M. & G. 887; *Lindley on Part.* (Vol. II.), § 674, pp. 907-910.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> See *Morris v. Glynn* (27 Beav. 218), where shares in an unincorporated iron company, working iron got from its own estates, and having estates for purposes other than that of iron manufacture, were held to be within the Mortmain Act, although by the deed of settlement of the company the shares were declared personal property. Considered subsequently in *Entwistle Co. v. Davis*, 4 Eq. 272.

<sup>4</sup> *Morris v. Glynn, supra*; *Lindley on Part.*, §§ 149-701; *Bentley v. Bates*, 4 Y. & C. 182; *Redmoyne v. Forster*, 2 Eq. 467.

<sup>5</sup> *Coll. on Mines*, p. 100 and note; *Reynolds' Exr. v. Bossett, Exr.*, cited by *Collier*; *Mayhew's case, supra*; *Watson v. Spratley, supra*; *Frederick v. Cooper*, 3 Iowa, 171; *Jeffries v. Smith*, 3 Russ. 158; *Crowshay v. Maule*, 1 Swanst. 518.



in many of the mining States, by statute,<sup>1</sup> but unless there is a statute prohibiting it, which would probably be unconstitutional,<sup>2</sup> a mining corporation has the same right, according to its charter and subject to statutory limitations, to convey its property, as any private citizen.<sup>3</sup> Where there is a statute prescribing the manner of conveying corporate property, or limiting the right, the corporation can only act according to the statutory method and within the limits prescribed by the statute, for the organization is itself a mere creation of the statute.<sup>4</sup> But it does not require a special law to enable a corporation to dispose of its property,<sup>5</sup> for the ownership of the property carries with it the right of disposition as an incident thereto, and a corporation can dispose of its land, property and effects as it may deem expedient, in the legitimate course of its business, and may also make an assignment for the benefit of its creditors, with or without preferences, unless restrained by law.<sup>6</sup> But a corporation cannot, independent of legislative authority, alienate or mortgage its franchise,<sup>7</sup> for such a contract is in violation of the contract with the State. The property of the corporation may be leased, however, with the same freedom as that of individuals,<sup>8</sup> providing there is nothing prohibiting it in the corporate charter or the stat-

<sup>1</sup> Laws Cal. 1880, p. 181 *et sub.*

<sup>2</sup> A statute will not be held void which provides how the ratification of a corporate conveyance shall be evidenced. (Cal. Act April 30, '80.) *Williams v. Gaylord*, 186 U. S. 157; *Boone on Cor.*, § 179 *et sub.*

<sup>3</sup> *Beach*, Vol. 1, Sec. 357; *Angell and Ames on Cor.*, § 187.

<sup>4</sup> *Beach*, Vol. 1, Sec. 365; 14 Fed. Rep. 319; *Wood Ry. Law*, 1686, and cases cited. *Williams v. Gaylord*, *supra.*

<sup>5</sup> *Partridge v. Badger*, 25 Barb. 146; *Miners' Ditch Co. v. Zellerbach*, 57 Cal. 588.

<sup>6</sup> *Ante, idem.*

<sup>7</sup> *Beach*, Vol. 1, Sec. 361; *Boone*, Sec. 179; *Carpenter v. Black Hawk Gold Mine Co.*, 65 N. Y. 43.

<sup>8</sup> *Beach*, Vol. 1, Sec. 363; *Hurt v. Terrell*, 83 Va. 167; *Boone*, Sec. 148, 268.

utes of the State, the same rules governing in this respect as in other alienations of the property. But where the corporation is only authorized by its charter to sell the real estate necessary for the transaction of its business, when not required for the uses of the corporation, this will not justify a lease of such real estate, nor could it maintain an action for rent under such a lease, as it was not necessary to the exercise of the purposes for which it was chartered.<sup>1</sup> And where, by statute, the conveyance can only be made by a certain per cent of the stockholders' consent, unless it is so ratified, as provided, it can have no effect.<sup>2</sup>

§ 94. *Of mines held in partnership.* — At common law one partner could not bind another to a deed, or any other instrument under seal, unless he had previously been given express authority for that purpose,<sup>3</sup> and such is still the law in one or two of the States of the Union.<sup>4</sup> But in most of the commercial States of the Union this doctrine has been relaxed and it is now held that one partner can execute a deed or other instrument under seal for his copartners and if it is for the purposes of the partnership business and they are all interested in the transaction they will all be bound alike by the conveyance.<sup>5</sup> Under this doctrine of agency as applied to partnerships one of

<sup>1</sup> *Metropolitan Co. v. Abbey*, 52 N. Y. Supreme Ct. Rep. 97; *Beach Cor.*, Vol. 1, Sec. 368.

<sup>2</sup> *Williams v. Gaylord*, 186 U. S. 157; *McShane v. Carter*, 80 Cal. 310; *Pekin Co. v. Kennedy*, 81 Cal. 356. Where a statute requires a two-thirds consent of shareholders for a corporate sale of *mining property*, timber and land of a mining corporation not used for such purposes are not within the statute. *Bagley v. Pitt. Iron Co.*, 90 Fed. Rep. 636.

<sup>3</sup> *Harrison v. Jackson*, 7 T. R. 207; *Dillon v. Brown*, 11 Gray, 179.

<sup>4</sup> *Turbeville v. Ryan*, 1 Humph. 113.

<sup>5</sup> *Mills v. Barber*, 4 Day, 428; *Grazebrook v. McCreadie*, 9 Wend. 439. But a partnership lease made to some member of the firm will inure to the benefit of the firm. *Mitchell v. Read*, 84 N. Y. 556.

several members of a firm could make a valid transfer of a mine or mining claim by a deed executed on behalf of the firm,<sup>1</sup> and his authority to so bind the firm could be shown by extraneous circumstances.<sup>2</sup> It has been held that the implied authority from the character and scope of the partnership business will enable one partner to bind the firm by any instrument under seal which that business requires,<sup>3</sup> and under this rule if it were necessary for the partnership business, one partner would have the full authority to convey a partnership mine or mining claim without express authority from his copartners,<sup>4</sup> but the weight of authority and the better doctrine would seem to be that such a conveyance could only be valid when made in accordance with a previous parol authority or one subsequently adopted by the other copartners.<sup>5</sup>

§ 95. *Doctrine of caveat emptor.* — The general doctrine of the common law of sales, applies to sales and transfers of mines, and the buyer takes subject to his own risks, as far as quality is concerned.<sup>6</sup> The doctrine of *caveat emptor* applies, in the absence of fraud or mistake, and un-

<sup>1</sup> *Eaton's Appeal*, 66 Pa. State, 483; *Betts v. June*, 57 N. Y. 274.

<sup>2</sup> *Butler v. Stocking*, 8 N. Y. 408.

<sup>3</sup> *Gram v. Seton*, 1 Hall, 262; *Butler v. Stocking*, 8 N. Y. 408.

<sup>4</sup> *Settembre v. Putnam*, 30 Cal. 490; *B. & W. L. C.*, p. 514; *Oatly v. Bourne*, 10 L. J. Ex. 361; *Taylor's Land. & Ten.*, §§ 113-117.

<sup>5</sup> *Skinner v. Dayton*, 19 Johns. 513; *Eaton's App.*, 66 Pa. St. 483; *Betts v. June*, 51 N. Y. 274; *Mills v. Barber*, 4 Day, 428; *Hart v. Withers*, 11 Pa. 285; *Grazebrook v. McCreadie*, 9 Wend. 439. A lease made or taken by one inures to benefit of all. *Mitchell v. Read*, 84 N. Y. 556. How far a partnership can exist in buying and selling real estate, see *Sage v. Sherman*, 2 N. Y. 417; *Fall River Co. v. Borden*, 10 Cush. 485. To make real estate firm property it must have been bought with firm assets and used for purposes of the partnership. *Cox v. McBurney*, 2 Sandf. 561; *Otis v. Sill*, 8 Barb. 102; *Anderson v. Lemon*, 8 N. Y. 236.

<sup>6</sup> *Corbett v. Berryhill*, 29 Iowa, 157; *Clark v. McElvy*, 11 Cal. 154. As to what will constitute a warranty, see *Tuck v. Downing*, 76 Ill. 71.

less the seller has given an express warranty,<sup>1</sup> or unless a warranty could reasonably be implied from the nature and circumstances of the sale,<sup>2</sup> the buyer cannot afterward complain if he was beaten in the bargain.<sup>3</sup> The parties to the trade deal with each other at arm's-length, and when neither is under legal disability, in the absence of evidence of imposition or misrepresentation, both are supposed to have equal means of information.<sup>4</sup> But the rule of *caveat emptor* does not apply to the title of the vendor, for in the absence of anything to the contrary, the law creates the implied warranty that he possesses the title to the mine or mineral claim which he undertakes to sell,<sup>5</sup> and although in sales of certain species of personal property, the purchaser waives objection to the title after

<sup>1</sup> *Tuck v. Downing*, *supra*.

<sup>2</sup> *Clark v. McElvy*, *supra*; 15 Am. and Eng. Enc. of Law, 578; B. & W. L. C. 424; *Harlan v. Lehigh Coal Co.*, 85 Pa. St. 287; *James v. Cochran*, 8 Exch. 556.

<sup>3</sup> *Wade Amer. Min. Laws*, pp. 219 and 220, and cases cited.

<sup>4</sup> *Carondelet Iron Works v. Moore*, 78 Ill. 65. As to sales in fraud of creditors, see *Henry v. Everts*, 29 Cal. 610. In *Small v. Attwood*, 6 Cl. and Fin. 232, the purchaser had sent a deputation to verify the representations of the seller, and was held to be precluded by this conduct, from relying on previous misrepresentations, for having failed to avail himself of all the knowledge or means of knowledge open to him, he could not afterwards be allowed to say that he was deceived by the misrepresentation of the vendor. *Fry Spec. Per. of Con.*, p. 282. But if the parties do not have equal means of information, or if fraud is used in the sale, either in the case of active misrepresentation or concealment, the sale will be set aside. *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 2 Ch. 55; *Grosvenor v. Sherrott*, 28 Beav. 659; *Carey v. Carey*, 2 Sch. and Leef. 173; *Gibson v. Jeyes*, 6 Ves. 266; *Gresley v. Mansley*, 3 D. G. F. & J. 433; *Blap. Prin. of Eq.*, § 232, p. 295; *Crump v. U. S. M. Co.*, 7 Gratt. 362; *McAleer v. McMurray*, 58 Pa. St. 126; *Page v. Parker*, 48 N. H. 47; *s. c.* 43 *Id.* 363.

<sup>5</sup> *Stombaugh v. Smith*, 23 Ohio St. 585; *Gesner v. Cairns*, 2 Allen (N. B.) 595; *Shaw v. Stenton*, 2 H. & N. 858; *Taylor v. Shafto*, 8 B. & L. 228; *Spoor v. Green*, 9 L. R. Ex. 99; *Harford & S. C. Co. v. Miller*, 41 Conn. 113. As to misrepresentations as to title, see *Culver v. Smith*, 82 Mo. App. 390.

taking possession of the property,<sup>1</sup> the purchaser of a mine, who buys under a contract for a future title, even though he takes possession of the mine and manages the property, if it was the intention of the parties that he should immediately take possession, this will not constitute a waiver of objections to a defect in the title by the purchaser.<sup>2</sup>

§ 95a. **Same — Buyer may remain silent.** — Under the doctrine of *caveat emptor*, the seller is not obliged, either in law or equity, to disclose patent defects in the subject-matter of the sale. It would be a very unreasonable rule to permit the seller to remain silent and compel the buyer to disclose his information concerning the subject-matter of the sale, and in order to do complete justice between the parties, the courts allow the purchaser to keep what information he may possess, and avail himself of the advantages known only to himself.<sup>3</sup> In the purchase of land, for a reasonable price, one is not bound to disclose the existence of a valuable mine beneath such land<sup>4</sup> even though he may know the seller to be ignorant of the same,<sup>5</sup> for the buyer is not bound, from

<sup>1</sup> *Campbell v. Fleming*, 1 Ad. & El. 40; *Negley v. Lindsay*, 67 Pa. St. 217; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 48; B. & W. L. C. 870.

<sup>2</sup> *Stephens v. Guppy*, 8 Russ. 171; B. & W. L. C. 403; *Babcock v. Case*, 61 Pa. St. 427; *Jones v. Bowles*, 9 Wall. 364; *Tuck v. Downing*, 76 Ill. 71. In cost book companies: *Curling v. Flight*, 2 Phil. 618. But see *Warring v. Crow*, 11 Cal. 366.

<sup>3</sup> *Page v. Parker*, 40 N. H. 47; *Renton v. Maryott*, 21 N. J. Ch. 123; *Harris v. Tyson*, 24 Pa. St. 347; *Fox v. Mackreth*, 2 Br. Ch. Ca. 420.

<sup>4</sup> *Harris v. Tyson*, 24 Pa. St. 347; B. & W. L. C. 351; *Fox v. Mackreth*, 2 Br. Ch. Ca. 420.

<sup>5</sup> *Bowman v. Bates*, 2 Bibb. (Ky.) 50; *Fox v. Mackreth*, *supra*. "But a purchaser who had discovered salt water, having prevented the agent of the vendor from giving information to his principal, and concealed his discovery by artifice, is guilty of fraud, and the contract should be set aside." *Bowman v. Bates*, *supra*.

the nature of the contract, to disclose his information, and although contrary to the principles of ethics, the sale would stand in law. But if the seller were under legal disability,<sup>1</sup> or if fraud or imposition could be imputed to the buyer,<sup>2</sup> the reasons for the rule would cease to exist in law, and the contract would of course be set aside.<sup>3</sup>

§ 96. Mines forming part of inheritance. — Mines forming part of the general inheritance are conveyed together with the land unless they are expressly reserved in the conveyance.<sup>4</sup> This rule, however, only obtains before the title to the minerals has been severed from the title to the surface, for where the title to the minerals is in some third party, there would be an implied reservation, in the grant of the surface, of the title to the minerals,<sup>5</sup> and such rights as would be necessary to the occupation, possession

<sup>1</sup> In case of infancy, see *Harris v. Tyson*, *supra*; *Wilkinson v. Stafford*, 1 Ves. Jr. 82; *Breed v. Judd*, 1 Gray, 455; *Dicklin v. Hammer*, 1 Drew. & Sm. 284.

<sup>2</sup> *Glamorganshire Iron & Coal Co. v. Irvine*, 4 F. & F. 947; *Williams v. Spurr*, 24 Mich. 385; *Livingston v. Peru Iron Co.*, 9 Wend. 513; *s. c.* 2 Paige Ch. 390; *Pottinger v. Hecksher*, 2 Grant Ca. (Pa.) 309.

<sup>3</sup> *Ante, idem.* B. & W. L. C., p. 396. "See, generally, on the subject of the right of vendor and purchaser, and the right of rescission, recovery of purchase money, *Bainbridge on Mines and Minerals*, Dallas' Edition, p. 165, note; *Edwards v. McLeay*, Coop. 308; *s. c.* 2 Swanst. 308; B. & W. L. C., *supra*.

<sup>4</sup> *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Caldwell v. Cope-land*, 37 Pa. St. 427; *Whitaker v. Brown*, 46 Pa. St. 197; *Hartwell v. Cammon*, 10 N. J. Eq. 128; *Pretty v. Sally*, 26 Beav. 606; 3 Wash. R. P., Bk. 2, Ch. 1, p. 382; *Moore v. Swan*, 17 Cal. 199.

<sup>5</sup> *Marvin v. Brew. Iron Co.*, 55 N. Y. 588; 14 Am. R. 322; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Massot v. Moses*, 3 S. Car. 168; 16 Am. Rep. 697. "When the minerals have been severed from the surface ownership the owner of the surface is not a tenant in common with the mine owner. *Canfield v. Ford*, 28 Barb. 386; *M. M. D.* 255. Latter could buy a tax title to the surface. *Hutchinson v. Kline*, 199 Pa. 564.

and enjoyment of the same.<sup>1</sup> And even where the minerals form a part of the inheritance and have never been conveyed, apart from the surface of the soil, if the grantor, in a conveyance of the soil, reserves the right and title to the minerals in the land, he acquires by reason of the reservation, all the implied powers necessary to a complete enjoyment of the right given him in the reserving clause.<sup>2</sup> And if the minerals form a distinct possession, a separate title is necessary to convey them, apart from the title to the soil.<sup>3</sup> But where the title to the minerals and the title to the land are in the same party, the two can be conveyed in the same deed,<sup>4</sup> or either could be transferred separately,<sup>5</sup> and the minerals lying under one parcel of the land could be conveyed in the deed used to convey another tract or parcel of the same owner,<sup>6</sup> and the title to the minerals thus conveyed

<sup>1</sup> *Turner v. Reynolds*, 23 Pa. St. 199; *U. S. v. Costillero*, 2 Black. (U. S.) 168; *Ridley v. Brown*, 20 Ala. 412; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 839. Unless reserved, minerals pass as an incident, in a conveyance of the freehold. *State v. Cooshaw Min. Co.*, 144 U. S. 550; *Dower v. Richards*, 73 Cal. 477; *Con. Coal Co. v. Schmisser*, 135 Ill. 371; *Kincaid v. McGowan*, 88 Ky. 91; *Snoddy v. Bolen*, 122 Mo. 479; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286; *Benevides v. Hunt*, 79 Tex. 383; *Williamson v. Jones*, 43 W. Va. 562; 20 Am. & Eng. Enc. Law, 775.

<sup>2</sup> *Ante, idem.* *Bainbridge on Mines*, 101; *New Jersey Zinc Company v. N. J. Franklinite Co.*, 13 N. J. Eq. 322; *Hosock v. Crill* (Pa. 1902), 53 Atl. Rep. 640.

<sup>3</sup> *Delaware & Co. v. Sanderson*, 109 Pa. St. 583; *Woodruff v. North Brainerdton G. M. Co.*, 18 Fed. Rep. 773; *Bullion M. Co. v. Croesus & Co.*, 2 Nev. 168.

<sup>4</sup> *Bainb.* 4; 1 Bl. Com. 294; 2 Wash R. P., Bk. 2, Ch. 2, § 3; 3 Kent, 378; *Duggan v. Dovey* (Dak.), 26 N. W. Rep. 887; *Stratton v. Lyons*, 53 Vt. 641.

<sup>5</sup> *Fairchild v. Fairchild* (Pa.), 7 Cent. Rep. 873; *Cahill v. Hilton*, 9 Atl. Rep. 255; *Adams v. Briggs Iron Co.* 7 Cush. (Mass.) 361; *Ryckman v. Gillis*, 57 N. Y. 68; s. c. 15 Am. Rep. 464; *MacSwinnney on Mines*, 27.

<sup>6</sup> *Caldwell v. Fulton*, 31 Pa. St. 474; *aff'd* 53 Pa. St. 229; *Hartwell v. Cammon*, 2 Stock (N. J.), Ch. 128. Ores under the surface may be

would give the owner of the minerals the right to a reasonable use of the tract of land, in which the minerals were contained.<sup>1</sup>

§ 97. **Reservation of mines and minerals.** — As before explained, where the title to the minerals has been severed from the title to the soil, there is an implied reservation of the minerals in a sale by the owner of the land.<sup>2</sup> In mining sections it is customary for the owner of the land, when he sells the same, to transfer it “subject to the rights of miners previously acquired in the land,”<sup>3</sup> and if any such rights have been acquired, this operates as a complete reservation of the same, together with all the easements previously acquired,<sup>4</sup> although, technically speaking, the clause is an exception, rather than a reservation, as a reservation can only be made to the grantor himself.<sup>5</sup> The owner of land, however, in a sale of the same, can reserve to himself or to any third party the title to any developed mine, or minerals lying undeveloped in the land,<sup>6</sup> and third parties are chargeable with notice of such reser-

the subject of grant separate and apart from the surface. *Kirk v. Mattier*, 140 Mo. 23.

<sup>1</sup> *Ante, idem*; *Turner v. Reynolds*, 23 Pa. St. 199. A contract in form of a lease, but with a right to mine until all ore is exhausted, is a sale of the mineral in the ground. *Hobart v. Murray*, 54 Mo. App. 249. See also *Butler v. McGorrick* (1902), 114 Fed. Rep. 300; *Salem Iron Co. v. Lake Sup. Co.*, 113 Fed. Rep. 339; *Phelps v. Church O. L.*, 115 Fed. Rep. 882; *Potter v. Rand*, 201 Pa. 318; *Matulys v. P. & R. Coal & Iron Co.*, 201 Pa. 70. But see *Crouch v. Welsh* (Utah), 66 Pac. Rep. 600.

<sup>2</sup> *Ante*, §§ 95 and 96.

<sup>3</sup> *Forman v. Platt*, 8 Pick. (Mass.) 339; *Smart v. Morton*, 3 Eng. L. & E. 385.

<sup>4</sup> *Cowan v. Hardeman*, 26 Texas, 217; *Earl of Cardigan v. Armitage*, 3 Dow. & Ry. 414; *Doud v. Kingscote*, 6 M. & W. 174.

<sup>5</sup> *Tiedeman R. P.*, § 848; *Corning v. Troy Iron Co.*, 40 N. Y. 209; *Westpoint Iron Co. v. Beymert*, 45 N. Y. 707; *Ryckman v. Gillis*, 57 N. J. 68.

<sup>6</sup> *Benson v. Miners Bank*, 20 Pa. St. 370; *Stockbridge Iron Co. v. Hudson Co.*, 102 Mass. 45; *Kirk v. Mattier*, 140 Mo. 23.



vation,<sup>1</sup> whether the owner be the government, or a private individual.<sup>2</sup> And where there is a reserving clause in such a conveyance, the specific right or estate is not alone reserved, but every other right which is appurtenant thereto and which is necessary to a reasonable enjoyment of the same.<sup>3</sup> But unless third parties have acquired rights which would be recognized by the courts, an express reservation would be necessary in order to reserve the title to minerals in the grantor,<sup>4</sup> and it would be the same with any easement, or other right or control over the demised premises,<sup>5</sup> and the same would not be recognized, unless specially reserved therein, whether the absolute title to the property is transferred, or only a leasehold interest therein.<sup>6</sup>

§ 98. **Dower attaches to.** — The wife's dower attaches to mines as well as other species of property of which the

<sup>1</sup> *Kansas City M. & M. Co. v. Clay* (Ariz.), 29 Pac. Rep. 9.

<sup>2</sup> *Kansas City Min. & Mill Co. v. Clay* (Ariz.), 29 Pac. Rep. 9; R. S. U. S. § 2258, Statutes at Large.

<sup>3</sup> *Tiedeman R. P.*, § 843; *Allen v. Scott*, 21 Pick. 25; *Sanborn v. Hoyt*, 24 Me. 118; *Pettee v. Hawes*, 13 Pick. 332; *Cowan v. Hardeman*, 26 Texas, 217. "The grant of the right to the stone carries with it, as a necessary incident, the right to enter and work the quarry, and to do all that is necessary and usual for the full enjoyment of the right, such as hewing the stone and preparing it for use." (*Green v. Putnam*, 8 Cush. 21; *Cardigan v. Armitage*, 2 B. & C. 197.) B. & W. L. C. 397 *et sub.*; *Plummer v. Coal & Iron Co.*, 104 Fed. Rep. 208.

<sup>4</sup> *Walt's Act. and Def.*, Vol. 4, p. 227; *Brunton v. Hale*, 1 Q. B. 792; 1 G. and D. 207; 6 Jur. 340. A reservation in a grant of oil land of one-half the royalty upon the oil in the land, is effectual to reserve the fee to one-half the customary per cent of oil paid in royalty. *Harris v. Cobb* (W. Va.), 88 S. E. Rep. 559.

<sup>5</sup> *Ante, idem.*

<sup>6</sup> *Taylor's Land. & Ten.*, § 156, and cases cited. *Wardell v. Watson*, 98 Mo. 107; *Coal Co. v. Mellon*, 152 Pa. St. 286; *Lillibridge v. Coal Co.*, 143 Pa. St. 293. Where a reservation specifies the manner in which the mineral reserved is to be worked, it is held to be a covenant running with the land. *Electric Co. v. West Ridge Coal Co.*, 187 Pa. St. 500; 41 Atl. Rep. 458.

husband was seized of an estate of inheritance during coverture.<sup>1</sup> She has dower in all freehold estates of inheritance, which her issue, if any, could have inherited, as heir of the husband, and of which he was seized during coverture.<sup>2</sup> It therefore includes mines, as well as other property comprehended under the term lands, tenements, hereditaments, both corporeal and incorporeal.<sup>3</sup> But dower will only attach to estates of inheritance, of which the husband was seized during coverture, and in order for the wife to have dower in mines of which the husband was seized during coverture, he must have held the mines in fee, or possessed an estate equivalent to a freehold estate of inheritance.<sup>4</sup> Where he does have such an estate, however, the dower will attach and it makes no difference whether the husband owned the mines or mine by himself, or whether he was a tenant in common or partner with others in the property.<sup>5</sup>

<sup>1</sup> *Stoughton v. Leigh*, 1 Taunt. 402. See the early case of *Thynn v. Thynn*, 1 Style, 67, 77, 91, 98, 101, 142; *Rockwell v. Morgan*, 18 N. J. Eq. 389; *Moore v. Rollins*, 45 Me. 498. "But dower is not due of unopened mines or deposits." *Stoughton v. Leigh*, 1 Taunt. 402; *M. M. D.* 88. *Dickins v. Hammer*, 1 Drew. & Sm. 284; *Coates v. Cheever*, 1 Cow. 463.

<sup>2</sup> *Tiedeman on R. P.*, §§ 115-148.

<sup>3</sup> *Ante*, *idem*; 2 Bl. Com. 131; 1 Washb. on R. P., 193-195. She has dower out of rents from mines. *Lenfers v. Henke*, 73 Ill. 405; *Hendrix v. McBeth*, 61 Ind. 473; *Aubin v. Daly*, 4 B. & Ald. 59; *Dickins v. Hammer*, 1 Drew. & Sm. 284.

<sup>4</sup> *Tiedeman R. P.*, § 116; *Goodwin v. Goodwin*, 33 Conn. 314; *Gillis v. Brown*, 5 Cow. 388; *Spangler v. Spangler*, 1 Md. Ch. 36; *Burris v. Page*, 12 Mo. 358.

<sup>5</sup> 1 Washb. R. P. 199; *Burnside v. Merrick*, 4 Metc. 537; *Potter v. Wheeler*, 13 Mass. 504; *Loyd v. Genover*, 25 N. J. L. 48; *Lee v. Lindell*, 23 Mo. 202; *Bopp v. Fox*, 63 Ill. 540. And the right extends not only so far as the mineral is exposed, but to its full extent. *Moore v. Rollins*, 45 Me. 498; *Billings v. Taylor*, 10 Pick. 460; *Findlay v. Smith*, 6 Muf. (Va.) 134; *Crouch v. Puryear*, 1 Rand. (Va.) 258. *But the doweress cannot, at common law, open new mines.* *Park Dow*. 117, 120; 1 *Scribner Dow*. 205; *King v. Dunsford*, 2 Ad. & El. 568; 5 *Amer. & Eng. Enc. Law*,

The wife's dower attaches to one mine, as well as several, and she is entitled to a division of the rents and profits;<sup>1</sup> but where the husband possessed several different mines it is not necessary that each mine should be divided, but it is sufficient to assign such a number of them as may amount to one-third in value of the whole.<sup>2</sup>

§ 99. *Sale by trustees.*—The rights and powers of trustees vary materially with the nature and terms of their trust and their rights and powers are either limited by the instrument creating the trust,<sup>3</sup> or by the court in such a manner as to carry out the purposes of the trust.<sup>4</sup> If the power of the trustee involves the exercise of a proprietary authority over the property, equity regards him as the owner, so far as it is necessary for the performance of the trust,<sup>5</sup>

891. See, however, under Texas statute, *Higgins Oil Co. v. Snow* (118 Fed. Rep. 488), holding that a right of dower gives a right to open and work every kind of mine on the property.

<sup>1</sup> *Stoughton v. Leigh*, 1 Taunt. 402; *Moore v. Rollins*, 45 Me. 498; *Hendrix v. McBeth*, 61 Ind. 473; 28 Am. Rep. 680; *Lenfers v. Henke*, 73 Ill. 405; *Billings v. Taylor*, 10 Pick. (Mass.) 460; *Coates v. Cheever*, 1 Cow. 460; *Rockwell v. Morgan*, 2 Beav. Ch. (N. J.) 384.

<sup>2</sup> *Stoughton v. Leigh*, 1 Taunt. 402. "Dower of mines may be assigned either severally or collectively with other lands; by metes and bounds if practicable, and if not, then by an apportionment of the profits, or by assigning its enjoyment to the widow for short alternate periods." *Coates v. Cheever*, 1 Cow. 463." M. M. D. 83, 84. "The profits of coal works on parcel of the deceased's lands must be considered in the assignment of dower to the widow; and if the land containing the coal work be collusively allotted to the widow, without consideration of the coal work thereon, a new assignment of dower will be awarded." *Hoby v. Hoboy*, 1 Vernon, 218. M. M. D. 84.

<sup>3</sup> 2 Washb. on R. P. 483; *Tiedeman R. P.* 513; 2 Pom. Eq. Jur. 991; *Russell v. Lewis*, 2 Pick. 508.

<sup>4</sup> *Woodman v. Good*, 6 Watts & L. 169; *Trustees, etc. v. Stewart*, 27 Barb. 553; *William's' App.*, 83 Pa. St. 377.

<sup>5</sup> *Beach v. Beach*, 14 Vt. 28. The trustee is entitled to the possession. *Tiedeman R. P.* 513. And may oust the *cestui que trust*. *Mordecal v. Parker*, 3 Dev. 425.

and to this extent the rights and powers of the *cestui que trust* are curtailed.<sup>1</sup> As the successful operation of a mine would necessitate the exercise of such proprietary authority in the trustee,<sup>2</sup> if at any time it should become necessary to sell the mine, in order to carry out the purposes of the trust, the trustee, in the absence of anything to the contrary, would have the implied power of sale.<sup>3</sup> But he must always act for the best interests of the *cestui que trust*, and in exercising the power of sale, must use a reasonable discretion.<sup>4</sup> If there is no prohibition against alienation the deed of the trustee would constitute a good conveyance,<sup>5</sup>

<sup>1</sup> *Ante, idem.*

<sup>2</sup> *Bainb. on Mines*, § 136; *Brewster v. Sime*, 42 Cal. 139; *McNeil v. Acton*, 22 L. J. Ch. N. S. 320; B. & W. L. C. 348-421; *Tiedeman R. P.* 513. "The mere fact that a person holding the legal title of stock and apparently having the right of disposition is styled 'trustee,' raises no implication that he has not authority to sell or hypothecate it in the usual course of business." *Brewster v. Sime, supra*, M. M. D. 384; *Thompson v. Toland*, 48 Cal. 99.

<sup>3</sup> *Brewster v. Sime*, 42 Cal. 139; *Cole v. Wade*, 16 Ves. 28; *Townsend v. Wilson*, 1 B. & Ald. 608; *Franklin v. Osgood*, 14 Johns. 553; *Wilbur v. Almy*, 13 How. 180; *Story's Eq. Jur.* 1280. But see *MacSwinney*, p. 133.

<sup>4</sup> *Hargrave v. King*, 5 Ired. Eq. (N. C.) 430; *Irwin v. Harris*, 6 Ired. Eq. 215. But courts will not usually interfere with a discretionary duty by a trustee. *Morton v. Southgate*, 28 Md. 41; *Haydell v. Hurck*, 5 Mo. App. 267. But see *contra*, 72 Mo. 253.

<sup>5</sup> *Ante, idem.* *Tiedeman R. P.* 513, p. 410; *Taylor v. Dickinson*, 15 Iowa, 484; *Story's Eq. Jur.* 1280. "The mere addition of the word 'trustee' after the name of a person to whom stock is transferred, is not sufficient to put persons dealing with the trustee upon inquiry as to the trustee's title, nor will it operate as constructive notice of the owner's equitable right." *Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 Cal. 99. M. M. D. 384. But a power to sell or convey in exchange will not enable trustees to sell the lands with an exception or reservation of the mines and minerals under them. *Buckley v. Howell*, 29 Beav. 546. Nor will trustees under a devise, to whom is given real estate in trust, to pay the rents, issues, and profits to one for life, and thus having the legal estate, have power during the life of such person to grant leases of mines. *Scott v. Stewart*, 27 Beav. 367; B. & W. L. C. 396 *et sub.*

and if there are two or more trustees all must join in the instrument of conveyance.<sup>1</sup> But as a court of equity gives the *cestui que trust* the power to dispose of the estate, whenever it can do so, without violating the express or implied purposes of the trust,<sup>2</sup> it is always better to have the *cestui que trust* join in the instrument of conveyance, for when the deed is executed by the two together, it passes the absolute title to the estate and the trust is destroyed, on account of the consequent merger of interests.<sup>3</sup>

§ 100. Sales by executors and administrators.—Whenever an executor or administrator comes into possession of mines of the deceased and is given no special instructions in respect to them, as the personal representative of the deceased he will have full power to dispose of them,<sup>4</sup> aside from the rights that he would acquire therein by reason of the perishable and uncertain nature of the property.<sup>5</sup> The executor or administrator, however, is not permitted, either directly or indirectly, to purchase at his own sale;<sup>6</sup> but such a purchase may be made

<sup>1</sup> Story's Eq. Jur., § 1280; Tiedeman R. P., § 513. "The deed of one of several trustees of mines can convey no beneficial interest in the estate." *Boston F. Co. v. Condit*, 19 N. J. Ch. 394. M. M. D. 384.

<sup>2</sup> Story's Eq. Jur., *supra*.

<sup>3</sup> Tiedeman R. P., *supra*.

<sup>4</sup> Bainbridge on Mines, 136; Wait's Acts. & Def. (Vol. 4), p. 430. But see Schouler, §§ 212, 509.

<sup>5</sup> *Ante, idem*; *Wetherill v. Seltzinger*, 9 W. & S. 177; *Garrett v. Noble*, 6 Sim. 504. But see *contra*, *Yahoola Min. Co. v. Feby*, 40 Ga. 479; *Estate Millenovich*, 5 Nev. 184.

<sup>6</sup> *Bently v. Craven*, 18 Beav. 75; *Kimber v. Barber*, L. R. 8 Ch. App. 56. He cannot derive a profit from the estate for himself. *Coltrane v. Worrell*, 30 Gratt. 434; *Bough v. Walker*, 77 Va. 99. "An executor, being also legatee, usurping a trust as to the working of his testator's colliery, may not make a profit out of the premises greater than would have accrued to him by the disinterested working of the premises under a trustee." *Wightwick v. Lord*, 6 H. L. Ca. 217. M. M. D. 384.

with the consent of those interested in the estate.<sup>1</sup> The personal representative is not liable for any failure in quality or title,<sup>2</sup> unless he can be charged with fraudulent representations, whereby the purchaser had been misled,<sup>3</sup> and there is no implied warranty of title in sales by executors and administrators,<sup>4</sup> and if the personal representative should give an express warranty of title or quality, the warranty would bind the personal representative and not the estate.<sup>5</sup> In the absence of judicial orders, the sale must be made at public auction,<sup>6</sup> but in many of the States statutes have been passed governing sales by executors and administrators,<sup>7</sup> and these officers are obliged to obey the instructions of the court as to the form and manner of sale.<sup>8</sup> But the general powers of executors, where restricted by statute, may be enlarged by an express power of sale given in the will,<sup>9</sup> and even where the

<sup>1</sup> *Dillinger v. Kelly*, 84 Mo. 561. But see *Harper v. Mansfield*, 58 Mo. 17; and *Mitchell v. McMullen*, 59 Mo. 252.

<sup>2</sup> *Tiedeman R. P.*, § 756, and cases cited; *Turpin v. Chesterfield Coal & Iron Co.*, 82 Va. 74.

<sup>3</sup> *Blsp. Prin. Eq.*, § 237, p. 800; *Hill on Trustees*, § 158; *Coles v. Trecothick*, 9 Ves. 234; *Smith v. Townsend*, 27 Md. 368; *Diller v. Brubaker*, 2 P. F. Sm. 498; *Wheeler v. Bell*, 26 M. A. 443.

<sup>4</sup> *Turpin v. Chesterfield Coal & Iron Co.*, *supra*; *Fogle v. Brubaker*, 122 Pa. 7; 22 W. A. C. 349; 15 Atl. Rep. 692.

<sup>5</sup> *Lockwood v. Gilson*, 12 Ohio St. 526; *StoudemueLLer v. Williamson*, 29 Ala. 558; *Bishop on Con.*, §§ 1252-53.

<sup>6</sup> *Wait's Act. & Def.* (Vol. 3); *Tiedeman on Sales*, 268; *Evans v. Chew*, 71 Pa. St. 47; *In re Gorman, etc.*, 50 Mo. 179.

<sup>7</sup> *R. S. Mo.* 1899, Chap. I.

<sup>8</sup> *Apel v. Helsy* (Ark.), 12 S. W. Rep. 703. But a sale in compliance with an order of the Probate Court is valid; *ante*.

<sup>9</sup> *Valentine v. Wyser* (Ind.), 7 L. R. A. 788; 123 Ind. 47; *Logan v. Glover*, 77 Tex. 448. But see *Watson v. Sutra* (Cal.), 24 Pac. Rep. 172. A direction in a will that the testator's trade (mining under a lease) shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate not employed

sale is made in violation of judicial or statutory instructions, if based on a valuable consideration and made in good faith, the purchaser will get a good title<sup>1</sup> and other persons interested in the property cannot complain as to the manner and form of sale.<sup>2</sup>

§ 101. **Partition of mines.** — Cotenants in a mine have the unrestricted right to alienate their shares in the common estate,<sup>3</sup> and it is possible for them to make partition of the estate by mutual conveyances to each other of their shares in different parts of the estate.<sup>4</sup> And

at his death in the trade for the purpose of carrying it on. *McNeillie v. Acton*, 4 De G. M. & G. 744; 23 L. J. Ch. 11; reversing in part s. c. 22 L. J. Ch. 820; M. M. D. 104.

<sup>1</sup> Tiedeman on Sales, *supra*; *Carroll v. Conley* (S. C.), 31 N. Y. L. R. 716; N. Y. Supp. 865; *Scholl v. Almstead* (Ga.), 11 S. E. 541; *Woodworth v. Root* (C. C. D. Neb.), 40 Fed. Rep. 723.

<sup>2</sup> *Drumheller v. Hoff*, 23 Mo. App. 161.

<sup>3</sup> *Bainb. on Mines*, 116; *Collier*, Secs. 5-12; *Rockwell on Mines*, Secs. 47-49. "As a mere question of right, distinguished from a question of practicability, partition may be made of mine as of other real property, but a mere license to mine cannot be the subject of partition. *Canfield v. Ford*, 16 How. Pr. 473; *Adams v. Briggs Iron Co.*, 7 Cush. 865." *Blanchard & Weeks Ltd. Cas.*, p. 326. "The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for a partition of real property, which are not denied by the answer, are deemed admitted for the purposes of the trial." *Hughes v. Devlin*, 23 Cal. 501; *B. & W. L. C.* 811. M. M. D. 26. As to agreements running with the land, forming partition, see *Coleman v. Coleman*, 19 Pa. St. 100; *Coleman v. Blewett*, 43 Id. 178; *Coleman's App. and Grubbs' App.*, 62 Pa. St. 252; *B. & W. L. C.* 275. "But mines in land when opened, are, from their nature, indivisible, and neither partition can be made at law nor dower assigned by metes and bounds. The only partition that can be made is to order a sale and divide the proceeds." *Lenfers v. Henke*, 73 Ill. 495; M. M. D. 255; *Adams v. Briggs Iron Co.*, 7 Cush. 861.

<sup>4</sup> *Ante, idem.* As to voluntary partition, see *Tiedeman on Real Prop-*

though the partition under the statute of frauds is required to be in writing,<sup>1</sup> if one of the cotenants relying on a parol partition, enters into possession and makes extensive improvements on the part allotted to him, in a subsequent action for partition, the court would probably confirm the parol partition, instead of making a new one.<sup>2</sup> When the partition is made the parties cease to be tenants in common, and each is vested with an estate in severalty in the part and parcel allowed to him.<sup>3</sup> But even after partition, one cotenant cannot acquire by purchase a superior title, which he could enforce against his former cotenants;<sup>4</sup> and although each cotenant has an unrestricted power to alienate his estate,<sup>5</sup> if one of two cotenants conveys his undivided interest in the land held in common to one person, and his undivided interest in a mine thereon to another, it has been held that neither of these grantees could compel the original cotenant to make partition.<sup>6</sup>

erty, § 260 and cases cited. See as to claims on public land, *Hughes v. Devlin*, 23 Cal. 501.

<sup>1</sup> *Statutes at Large*; *Gardner M. Co. v. Heald*, 5 Me. 384; *Wood v. Fleet*, 30 N. Y. 501; *Pratt v. Hubbels*, 5 Ohio, 243.

<sup>2</sup> *420 Mining Co. v. Bullion Min. Co.*, 3 Saw. 634; *Morely v. Pettel*, 38 Ill. 128; *Jackson v. Harder*, 4 Johns. 202; *Gregg v. Blackmore*, 10 Watts, 192; *Corbin v. Jackson*, 14 Wend. 619.

<sup>3</sup> *Tiedeman on R. P.*, *supra*; 1 Washb. on R. P. 689; *Feather v. Strohecker*, 3 Pa. St. 505; 25 Mich. 382.

<sup>4</sup> *Tiedeman on R. P.* 252; *Hussey v. Blood*, 29 Pa. St. 319; *Picot v. Page*, 26 Mo. 398; *Butler v. Porter*, 13 Mich. 292.

<sup>5</sup> *Tiedeman on R. P.*, § 260, p. 172.

<sup>6</sup> *Adam v. Briggs Iron Co.*, 7 Cush. 361; *Boston &c. Co. v. Condit*, 4 C. E. Green's Ch. (N. J.) 395. "And so partition of land containing an ore bed, the extent and richness of which was not known, has been refused." *De Witt v. Harvey*, 4 Gray, 486; *Conant v. Smith*, 1 Alk. (Vt.) 67.



## CHAPTER VIII.

### FRAUD IN THE SALE OF MINES.

- SECTION 102.** Elements of actionable fraud.
- 103. Mis-statement as to value.
  - 104. Matters of opinion. Purchase after examination.
  - 105. Effect of fiduciary relation.
  - 106. Continued — Agent cannot make secret profit.
  - 107. Same — False prospectuses of projected companies.
  - 108. Where purchaser conceals value of mineral.
  - 109. Confirmation of fraudulent transaction.

§ 102. **Elements of actionable fraud.** — To sustain an action for fraud in the sale of mining property it has been said that the representations should not only be groundless and not believed to be true by the party making them, but of such a character as to impose upon an ordinarily prudent man, and lead him to rely on the representations and not on his own means of observation.<sup>1</sup> If the representations go to the nature and character of the property offered for sale, as affecting its value, and are discovered to have been false, to the knowledge of the party making them, the foundation is laid for an action for the deception practiced, and a court of equity would set aside the contract of sale.<sup>2</sup> But representations which will entitle a

<sup>1</sup> *Page v. Parker*, 43 N. H. 47; *s. c.* 43 *Id.* 363. "If persons make assertions of facts as to which they are ignorant whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue. (Per Lord Cairns.)" *In re Reese River M. Co.*; *Smith's case*, L. R. 4 H. L. 64; M. M. D. 116. "A false affirmation of a material act, though innocently made, is ground for rescission if the other party was misled by it." *Smith v. Richards*, 13 Pet. 39; M. M. D. 116; *Cooper v. Lovering*, 106 Mass. 77. But see, *contra*, *Poag v. Charlotte Oil Co.*, 61 S. C. 190; *Boddy v. Henry*, 113 Iowa, 462.

<sup>2</sup> *Atwood v. Small*, 6 C. & F. 395; reversing *Small v. Atwood*, 1 Young, 407. "Misrepresentations to constitute sufficient grounds for

party to recover on the ground of fraud must be both false and fraudulent, and such as tend to induce and result in actually inducing the purchaser to make the trade.<sup>1</sup> It must appear affirmatively that the representations were brought home to the plaintiff's knowledge and that he relied thereon and was injured as a consequence therefrom.<sup>2</sup> It is not necessary, however, that the representations, inducing the purchase, were the sole inducement to such purchase.<sup>3</sup>

§ 103. *Mis-statements as to value.* — False and fraudulent representations and statements as to the value of the

setting aside a purchase must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth, or without reasonable grounds for such a belief." *Jennings v. Broughton*, 5 De G. M. & G. 126; affirming 17 Beav. 234. M. M. D. 116.

<sup>1</sup> *McAleer v. McMurray*, 58 Pa. St. 126. "Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy: Held, that he was not entitled by reason of them to have the contract rescinded." *Jennings v. Broughton*, 5 De G. M. & G. 126; affirming s. c. 17 Beav. 234. M. M. D. 116. The mis-statement must be of a past or present fact. *Morris v. McMahon*, 75 Mo. App. 494.

<sup>2</sup> *McAleer v. McMurray*, *supra*: "The fact of defendant examining a mine before taking lease, and having it examined by others, considered as evidence that he had taken such lease on his own or his friends' judgment, and not on the representations of the lessor." *Haywood v. Cope*, 25 Beav. 140. M. M. D. 116.

<sup>3</sup> *Clarke v. Dickson*, 6 C. B. N. S. 453: "The sale of mining stock upon false representation of material facts in regard to which the purchasers may be presumed to have trusted the vendors, is void whether the vendors knew such representations to be false or not, and whether made with a fraudulent intent or not." *Crump v. U. S. M. Co.*, 7 Gratt. 862. M. M. D. 116. Mixing silver with samples of ore from a mine, to induce sale, is a fraud upon the purchaser. *Mudskill Min. Co. v. Watrous*, 61 Fed. Rep. 168. For suit to recover purchase money, because of a "salted" gold mine, see *Bearden v. Jones* (Tenn.), 48 S. W. Rep. 88.

mine or subject-matter of the sale, whether made by the vendor<sup>1</sup> or vendee,<sup>2</sup> constitute a sufficient ground for release from the contract of sale, and particularly if the party to whom the statements are made is not equally informed as to the value of the property.<sup>3</sup> Reckless statements of the capacity of a mine, made with a view to influence parties to take shares, and not put forth upon a fair and reasonable belief of the truth of the statements made, has been held to be a fraud upon the purchaser,<sup>4</sup> and a statement that land, sought to be purchased, was "only fit for a sheep pasture," when known to contain a valuable iron bed, has been held a fraud on the vendor, who resided at a distance and was unacquainted with the nature of the land.<sup>5</sup> Fraudulent statements as to the value of a mine, made by the seller to the purchaser, may either be used to avoid the sale, or given in evidence under a proper state of the pleadings, to defeat the collection of the purchase price;<sup>6</sup> and statements of the value and richness of a mine, and its nearness to wood and water, are not mere matters of opinion or information, but are facts upon which the purchaser has a right to rely.<sup>7</sup> But false and fraudulent statements by the vendor of land that it contained large deposits of oil "of great value for boring and manufacturing," accompanied with the statement that the land had not yet been tested, are in their very nature, but matters of opinion, for which no action would lie;<sup>8</sup> and

<sup>1</sup> *Gifford v. Corville*, 29 Cal. 589.

<sup>2</sup> *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 2 Ch. 25. But see *Harris v. Tyson*, 24 Pa. 347.

<sup>3</sup> *Bispham's Prin. of Eq.*, § 232, and cases cited.

<sup>4</sup> *Glamorganshire I. & C. Co. v. Irvine*, 4 F. & F. 947. As to evidence of value, see *Henry v. Everts*, 29 Cal. 610.

<sup>5</sup> *Livingston v. Peru Iron Co.*, 9 Wend. 513; s. c. 2 Paige Ch. 390.

<sup>6</sup> *Gifford v. Corville*, 29 Cal. 589; *Renton v. Maryatt*, 21 N. J. Ch. 123.

<sup>7</sup> *Gifford v. Corville*, *supra*.

<sup>8</sup> *Holbrook v. Connor*, 60 Me. 578.

statements that an oil well is "paying" and that the oil is of a "superior quality" are matters of opinion rather than assertions of facts.<sup>1</sup>

§ 104. **Matters of opinion — Purchase after examination.** — In the sale of mines, or other species of property, the seller has the right to "puff" it in extravagant terms, so far as statements of his opinion of the value and quality of the property is concerned, for it is optional with the purchaser to act on his own judgment or that of the seller.<sup>2</sup> Wherever the facts show that the purchaser relied on his own judgment instead of that of the seller, as where he personally examines the property before purchase, he cannot then be heard to say that he was influenced by the misrepresentations of the vendor,<sup>3</sup> unless the latter was an expert in regard to his knowledge of the property sold, in which case the parties do not

<sup>1</sup> *Kimmons v. Wilson*, 8 W. Va. 584. Merestatements of opinion that mine is rich in silver and would pay large dividends will not authorize rescission of sale of stock. *Crocker v. Manley*, 164 Ill. 282; 45 N. E. Rep. 577; *Belmont Min. Co. v. Rogers*, 10 Ohio C. C. 805. Representations of the money value of property, open to inspection, are mere expressions of opinion, for which no action will lie. *Cornwall v. Morland Real Est. Co.*, 150 Mo. 377; 51 S. W. Rep. 736.

<sup>2</sup> *Tuck v. Downing*, 76 Ill. 71; *Renton v. Maryatt*, 21 N. J. Ch. 123. See as to false statements of cost of property, *Holbrook v. Connor*, 60 Me. 578; *Hemper v. Cooper*, 8 Allen, 334; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 79; *Noltling v. Wright*, 72 Ill. 390. But see as to false statements of value, *Simon v. Canaday*, 53 N. Y. 296; *Cruess v. Fessler*, 39 Cal. 386; *Gifford v. Carville*, 29 Cal. 589; *Davis v. Jackson*, 22 Ind. 233; *Niel v. Cummings*, 75 Ill. 170; *Morehead v. Eades*, 3 Bush, 121; *McAleer v. Horsey*, 35 Md. 439.

<sup>3</sup> *Tuck v. Downing*, 76 Ill. 71; *Smith v. Richards*, 13 Pet. 89; *Clarke v. Dickson*, 6 C. B. N. S. 453. In *Tuck v. Downing*, *supra*: "Alleged representations of defendant that C. & S. had each paid \$5,000 for a share, such persons being near neighbors of complainant, and the verification or contradiction of the representations easy and practicable: Held, not such representations as could have influenced, the complainant being 'a man of business and experience.'" M. M. D. 125.

deal on equal terms.<sup>1</sup> And the same rule applies where the purchaser relies on the report of an assayer as to the value and quantity of ore taken from a mine, for even if the analysis should be incorrect as to the quantity and quality of the mineral, the purchaser, in relying on the same, had constituted the assayer his agent for the purpose of assaying the ore, and in the absence of fraud or collusion he would be bound by the contract.<sup>2</sup> But the rule allowing a vendor to "puff" his property, and appreciate its value, only applies where the purchaser has a full opportunity of inspection and examination of the property, and if it is so situated that he cannot personally examine the same, or if the vendor was an expert as to the matters upon which he had expressed an opinion, he would not, in such case, be permitted such latitude of commendation.<sup>3</sup>

**§ 105. Effect of fiduciary relation.**—Any transaction between persons occupying a fiduciary relation, even in the absence of fraud, whereby the confidence growing out of

<sup>1</sup> See *Bispham's Prin. of Eq.*, § 207, p. 264; *Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515. See as to misrepresentations of fact, *Tyler v. Block*, 18 How. 280; *Bennett v. Judson*, 21 N. Y. 238; *Manning v. Albee*, 11 Allen, 532; *Kent v. Freehold S. & B. Co.*, Law Rep. 4 Eq. 588; *Smith v. Reese R. Min. Co.*, L. R. 2 Eq. 264.

<sup>2</sup> *Blanchard & Weeks Ltd. Cas.*, p. 384 *et sub.*; *Weist v. Myers & Grant*, 71 Pa. St. 95. "Weist, without inspection, bought from Hickcox and Coryell, the owners, silver mines, upon their representation that they would yield a certain amount; the contract to be void if Weist should not approve the report of a selected assayer. After the report, Weist paid a large part of the purchase-money; on working the mines by Weist, the product was only one-third of the representations: Held, that Weist was liable for the remainder of the purchase-money, unless the misrepresentation was intentional." B. & W. L. C. 384, *et sub.*

<sup>3</sup> *Gatty v. Holcomb*, 44 Ark. 216; *Bisp. Prin. Eq.*, § 207, p. 264; *Adams v. Soule*, 33 Vt. 549. Mere inspection by purchaser will not prevent relief, where there is also misstatements, not investigated, as where it was represented that pits contained extensive ore beds, not examined. *Green v. Turner*, 86 Fed. Rep. 837.

the existing relation is exerted to obtain an advantage of the confiding party, will be set aside and the person availing himself of his position to obtain advantage, will be deprived of all benefit received.<sup>1</sup> This rule applies as well to trustee and *cestui que trust*,<sup>2</sup> as to all other persons occupying a fiduciary or *quasi* fiduciary relation,<sup>3</sup> and equity not only views all transactions between persons occupying such relations with a jealous eye, but it prevents such parties from realizing any profit accruing by reason of such relations, without the fullest and most complete disclosure.<sup>4</sup> This rule, however, does not apply to promoters of companies, or affect sales of property made by them to the

<sup>1</sup> *Tate v. Williamson*, L. R. 2 Ch. 61, per Lord Chelmsford (a leading case). "There Tate, a young man of twenty-three, who was the owner of a moiety of a freehold estate, and who was largely indebted, wrote to his great-uncle for advice and assistance in regard to the payment of his debts. His great-uncle sent a nephew, Williamson, to see Tate upon the subject, and Williamson made an offer to purchase Tate's moiety of the estate for £7,000, which was verbally accepted. Before any agreement was signed Williamson obtained a valuation by a surveyor, estimating the value of the mines under the tract at £20,000. The sale was completed without this information having been communicated to Tate. A bill was subsequently filed by Tate to set the sale aside, and a decree in his favor was made by Vice-Chancellor Wood, which was affirmed by Lord Chelmsford." Bispham's Prin. of Eq., Sec. 232, pp. 294, 295.

<sup>2</sup> *Bailey v. Watkins*, 6 Bligh. N. R. 275 n.; Bainb. on Mines, 180; B. & W. L. C. 400. As to purchases from infants, see *Becker v. Hastings*, 15 Mich. 47.

<sup>3</sup> Bisph. Prin. of Eq., § 232, p. 300. A cotenant who purchases outstanding title, held trustee of same for cotenants. *Mills v. Hart*, 24 Colo. 505; *Cecil v. Clark*, 44 W. Va. 659. But tenant must contribute *pro rata* of purchase price. *Hodgson v. Fowler*, 24 Colo. 278.

<sup>4</sup> *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; Bisph. Prin. of Eq. § 232, p. 301. Transactions between directors and stockholders are not within this rule. *Carpenter v. Danforth*, 52 Barb. 581. A relocation of a claim upon the public land, by an agent, to defeat the locator's rights, will inure to benefit of original claimant. *Haws v. Vict. Co.*, 160 U. S. 303; *Largely v. Bartlett*, 18 Mont. 265; *Argentine Co. v. Benedict*, 18 Utah, 183; 20 Am. & Eng. Enc. Law (2 Ed.), 703.

association, before the formation of the company. Persons already owning property, may enter into an association and sell to their associates, at any agreed price, without disclosing the profit realized, or without being guilty of any breach of trust or confidence, in the absence of fraud or false representations.<sup>1</sup> But as soon as the company is formed a confidential relation springs up, and none of the members can purchase property for the company, and realize a profit thereby, without a full disclosure of the facts to the company, together with an accounting.<sup>2</sup>

§ 106. Continued—Agent cannot make secret profit. The rule that parties occupying fiduciary relations are not permitted to make a profit by reason of the confidence reposed in them applies to parties occupying the position of principal and agent, and the agent is not permitted to reap any advantage or profit by reason of his position as such, without a full and complete disclosure to his principal.<sup>3</sup>

<sup>1</sup> *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; B. & W. L. C. 370; 14 P. F. S. 49; *McElhaney v. Hubert Oil Co.*, 11 P. F. S. 49; *Sydney Iron Ore Co. v. Bird*, 33 Ch. D. 85. But see *Short v. Stevenson* (33 Pa. St. 95). "Stevenson being in negotiation for oil land, proposed to form a company to purchase, representing that the land could be bought for \$12,000, and induced Short to take and pay for a share in it at \$1,000. Stevenson bought the land for \$6,000, without disclosing to his associates the price which he gave: Held, that on these facts Short could recover the whole amount he had advanced." M. M. D. 119; *Pittsburg Min. Co. v. Sproule*, 74 Wis. 307; *Alger Prom. Cor.*, § 57, p. 61; *Ladywell Min. Co. v. Brooks*, 35 Ch. D. 411.

<sup>2</sup> *Densmore Oil Co. v. Densmore*, *supra*; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 73; 8 App. Cas. 1218-1236-1242; *McAlver v. McMurray*, 8 P. F. S. 126; *Simons v. Vulcan Oil Co.*, 11 P. F. S. 202; *s. c.* 61 Pa. St. 202; *McElhaney's App.*, 11 *Id.* 192; *Short v. Stevenson*, 13 P. F. S. 95; *Bailey v. Coal Co.*, 19 *Id.* 340; *Collins v. Case*, 23 Wis. 230; *Lindley on Partnership*, 481; *Fox v. Mackreth*, 1 Lead. Cas. Eq. 161 (4 Eng. Ed.); *South Joplin Land Co. v. Case*, 104 Mo. 572; *Nanty Iron Co. v. Grove*, 12 Ch. D. 738; *Emma Silver Min. Co. v. Lewis*, 4 C. P. D. 396.

<sup>3</sup> *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *Bliss Prin. of Eq.*,

The agent's knowledge belongs to the principal and he should give him the benefit of all information possessed by him in regard to the latter's property.<sup>1</sup> If he conceals the amount offered for property in his hands for sale and purchases the property from the principal in his own name at a less sum, and then transfers the same for an increased amount, the principal is entitled to the profit realized from such a sale, and he would not be denied an accounting from the agent, even though he should have partially assented to the fraud practiced.<sup>2</sup> In the organization of companies, if property is purchased with the company's money, or if the purchasers act in the capacity of agents of the company, they are not permitted to make a profit from their purchase, without a full disclosure to their principal,<sup>3</sup> and the company would be entitled to any profit realized.<sup>4</sup> But if the purchasers did not act as agents of the company, or if they should disclose the amount paid for the property and refuse to sell except for an advanced sum, this is perfectly consistent with honesty and fair dealing and they would have a right to retain the profit, if the company, with a full knowledge of the facts, should

§ 232, p. 300; *Union M. Co. v. Rocky M. Bank*, 2 Colo. 248, 565; L. C. 1 *Id.* 531. "A person employed on behalf of himself and his copartners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. When therefore a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership." *Fawcett v. Whitehouse*, 1 R. & M. 132. M. M. D., 124; *Emma Sil. Min. Co. v. Grant*, 11 Ch. D. 918; *McElheney's App.*, 61 Pa. St. 188; *In re Westmoreland Slate Co.*, 2 Ch. 612.

<sup>1</sup> *Bisp. Prin. of Eq.*, *supra*; *Bell v. Bell*, 3 W. Va. 183.

<sup>2</sup> "An agent for sale of (oil) lands learning of an increased price to be got therefor, cannot make a valid bargain with his principal and become the purchaser himself, without disclosing such fact." *Bell v. Bell*, 3 W. Va. 183. M. M. D. 118.

<sup>3</sup> *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202.

<sup>4</sup> *Ante, idem.*



take the property at the advanced sum;<sup>1</sup> and if the principal should participate with the agent in a fraud upon a third party, he could not for this reason, avoid the payment of the agent's compensation, but would himself be held to a full compliance with his contract with the agent, although they had defrauded some third party.<sup>2</sup>

§ 107. **Same — False prospectuses of projected companies.** — In advertising the proposed advantages of projected companies by means of prospectuses, the promoters are bound to state all facts within their knowledge, and not to omit the statement of any material facts that would be likely to influence the public to take shares in the company.<sup>3</sup> The prospectus and advertisement of the promoters of the company constitute the contract of the company with the shareholders and for a misrepresentation in any material fact, or for a failure to state material facts in the prospectus, the contract could be avoided by the shareholder.<sup>4</sup> And the shareholder could

<sup>1</sup> *Simons v. Vulcan Oil Co.*, *supra*. As to how far company is affected by fraud of its organizers, see *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Rep. M. 456.

<sup>2</sup> *Hardy v. Stonebraker*, 31 Wis. 640. Since there is no joint tenancy between surface and mineral owner, the latter can buy the surface owner's title at tax sale and no trust results. *Hutchinson v. Cline*, 199 Pa. St. 564; 49 Atl. Rep. 312.

<sup>3</sup> *Bispham's Prin. of Eq.*, § 208, p. 266; *Hollows v. Ferril*, L. R. 3 Ch. 475. "A prospectus of an oil company stated that the company had purchased their land from the 'original owner.' Held, that this was not a term of art to be explained by experts, but implied that no profits were added to the price paid by the company on account of an intermediate buyer, etc., and excluded the idea of a purchase at speculative prices." *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202. M. D. 119.

<sup>4</sup> *Smith's case*, L. R. 2 Ch. 609; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Paddock v. Fletcher*, 42 Vern. 389; *McClellan v. Scott*, 24 Wis. 81; *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873; *Edgington v. Fitzmaurice*, 29 Ch. D. 459. But the rule is different if the stock is bought in open

either set the contract aside and recover back the amount paid, or wait until sued for calls and set up the fraud by which he was induced to join the company, as a defense.<sup>1</sup> But the statements made, to render the contract void, must have been material inducements to the stockholder to join the company,<sup>2</sup> and where the representation consisted in a description of a certain kind of property to be purchased by the company and on a failure to get this property, other of an equal value was obtained, this was not held a sufficient fraud to avoid the contract.<sup>3</sup>

**§ 108. Where purchaser conceals value of mineral. —**

As a general rule, fraud may consist as well in a suppression of the truth as an actual fraudulent misrepresentation, and one is regarded with as much disfavor by the courts as the other,<sup>4</sup> and this is particularly true where the law imposes

market and not of the strength of the prospectus. *Peek v. Gurney*, L. R. 6 House of Lords Cases, 377. But see *Phelps v. Wait*, 30 N. Y. 78; *Sandom v. Moore*, 8 Barb. 353; *Bruff v. Mole*, 36 N. Y. 200; *Alger Prom. Cor.* 36-57.

<sup>1</sup> *Blsp. Prin. of Eq., supra*; *Alger Prom. Cor., supra*.

<sup>2</sup> *Jennings v. Boughton*, 17 Beav. 234; *aff'd in 5 De G. M. & G.* 126.

<sup>3</sup> "In the prospectus, the company set forth a description of ten tracts of land it proposed to purchase, but only purchased eight, owing to the defective title to the others: Held, that on an action brought for fraud in the representations of the prospectus, it was error for the court to charge that if from the prospectus the plaintiff had a right to believe the company would acquire the property, and that the company were organized with a view to the ownership of those pieces of property, and if it did not obtain them, the plaintiff would be entitled to recover,—where the evidence showed the purchase by the company of one other tract supposed to be equally valuable for mining purposes, and that the company had retained \$75,000 in the treasury, as the price of the remaining tract." *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 505. *M. M. D.* 120; *Martin v. Eagle Cr. Sev. Co.*, 41 Oregon, 448; 69 Pac. Rep. 216.

<sup>4</sup> *Kerr on Fr. & Mis.* 91, 92, 95; *Blsp. Prin. of Eq.*, § 213, p. 270; *Leake on Con.* 184; *Young v. Bumpus*, 1 Freem. Ch. 241; *Paddock v. Strobbridge*, 29 Vt. 470, 477.

upon the party the duty to speak.<sup>1</sup> But in the case of sales, since the rule of *caveat emptor* permits the seller to remain silent as to the subject-matter of the sale, and the buyer takes at his own risk,<sup>2</sup> the law does not compel the purchaser to disclose advantages known only to himself, but allows him to conceal such knowledge as he may possess in regard to the property about to be purchased, and the purchaser of land under which there is a valuable deposit of mineral known only to the purchaser, is a familiar illustration of this doctrine.<sup>3</sup> In such case the purchaser is not bound to disclose the fact that the land is rich in mineral deposits, for this is a matter upon which the seller should inform himself.<sup>4</sup> But this rule only applies where the parties deal on equal terms; where they have equal means of information, and in the absence of a fiduciary relation between them.<sup>5</sup> If the vendee during the negotiation of the purchase, makes any misrepresentation of material facts, by which the vendor is induced to sell at a lower price than he otherwise would, the sale would be fraudulent and void, and could be subsequently set aside by the vendor,<sup>6</sup> and if the vendee, in such case, should make any representations, he should inform the seller of all material facts, and if he concealed a part of the truth, which was material and should have been disclosed, it would

<sup>1</sup> *Ante, idem.*

<sup>2</sup> See as to rule in sale of mines, *Tuck v. Downing*, 76 Ill. 71, and *Benton v. Maryatt*, 21 N. J. Ch. 123.

<sup>3</sup> *Turney v. Horney*, Jac. 169, 178; *Harris v. Tyson* (a leading case), 12 Harris (Pa.), 347; B. & W. L. C. 351. See *Williams v. Spurr*, 24 Mich. 335.

<sup>4</sup> *Ante.*

<sup>5</sup> *Williams v. Beasley*, 3 J. J. Marsh. 578; *Low v. Grant*, 37 Wis. 548; *Bigelow on Fraud*, 33. See also *Bisp. Prin. of Eq.* 232; *Tate v. Williamson*, L. R. 2 Ch. 55; L. R. 1 Eq. 528. See also *Cecil v. Spurger*, 32 Mo. 462; *Borrow v. Alexander*, 27 Mo. 530; *McAdams v. Cates*, 24 Mo. 223, and *Patterson v. Kirkland*, 34 Miss. 423-431.

<sup>6</sup> *Harris v. Tyson*, 24 Pa. St. 397; B. & W. L. C. 351 *et sub.*

be the same as though he had fraudulently distorted the facts.<sup>1</sup>

§ 109. **Confirmation of fraudulent transactions.** — A sale which could otherwise have been avoided on account of the fraud practised, may still be confirmed or ratified by the subsequent acts of the party injured,<sup>2</sup> or he may be deprived of his remedy on the ground of laches, through his own delay in bringing the suit,<sup>3</sup> and this is particularly applicable to property of a fluctuating value, liable to large and sudden increase in value.<sup>4</sup> Generally, after a fraud has been perpetrated, if the injured party continues to use the subject-matter of the sale, in the same respect as though it were his own property, he cannot afterward recover the consideration from the seller,<sup>5</sup> and in all cases where he would avail himself of the right to avoid the sale, he must do so within a reasonable time.<sup>6</sup> But when the defense of a confirmation of the fraud is relied on by the defendant, since no one is permitted to take advantage of his own wrong, it must appear that the confirmation was made with a full knowledge on the part of the injured

<sup>1</sup> Bisp. Prin. of Eq., p. 270; Kerr on Fraud and Mistake, 91, 92.

<sup>2</sup> Negley v. Lindsay, 67 Pa. St. 217; Bisp. Prin. Eq., § 259, p. 323.

<sup>3</sup> Smith v. Clay, Ambl. 645; Bisp. Prin. Eq., § 260, p. 324; Wills v. Wood, 28 Ken. 400; Gifford v. Carville, 29 Cal. 589.

<sup>4</sup> Bisp. Prin. Eq., *supra*; Grimes v. Sanders, 3 Otto, 62; Sullivan v. Portland & Co., 4 Otto, 806; Wills v. Wood, 28 Ken. 400; Thomas v. Barlow, 48 N. Y. 200; Lloyd v. Brewster, 4 Paige, 537.

<sup>5</sup> Campbell v. Fleming, 1 Ad. and El. 40.

<sup>6</sup> Gifford v. Carville, 29 Cal. 589; Roth v. Vanderlyn, 44 Mich. 597. What would be an unreasonable delay must vary with the circumstances of each case. Kerr on Fraud & Mistake, 304-305; Reese R. Min. Co. v. Smith, L. R. 47 L. L. Cas. 64; Ashurst's App., 40 P. F. S. 290; Evan's App., 31 *Id.* 278. "The right to repudiate a contract on account of fraud, once lost by acquiescence is not revived by the subsequent discovery of another incident in the same fraud (that the outlay on the mine had been only £5,000 instead of £35,000 as represented)." Campbell v. Fleming, 1 Ad. & El. 40. M. M. D. 123.

party, of his right to set aside the contract, and unless it appear that he acted advisedly and for the purpose of confirming the otherwise void transaction, this defense would not avail the wrong-doer.<sup>1</sup>

<sup>1</sup> Bispham's Principles of Eq., § 259, p. 323; Kerr on Fraud and Mistake, 296. "Where there has been fraud the vendee may rescind and recover back the price paid, but the tender should be in a reasonable time after the discovery of the fraud; by undue delay the contract would be affirmed. In this case (fraudulent sale of oil stock), four months was held to be undue delay." *Leaming v. Wise*, 73 Pa. St. 173; M. M. D. 160. Where, after knowledge of facts, a defrauded purchaser buys machinery and works ore, he ratifies the fraudulent sale. *Eldridge v. Y. A. C. Mining Co.* (Wash. 1902), 67 Pac. Rep. 703. See also *Martin v. Eagle Creek Dev. Co.* (1903), 41 Oreg. 448; 69 Pac. Rep. 216.

## CHAPTER IX.

### MINING LEASES.

- SECTION 110.** Form and general nature of lease to mine.
- 111. Agreements for future leases.
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  - 114. Same — Partners and tenants in common.
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§ 110. Form and general nature of lease to mine. — No particular form of words is necessary in order to constitute a mining lease.<sup>1</sup> The words usually employed are “demise, grant, lease and let for mining purposes,”<sup>2</sup> but any other terms or form of words, that express the intention of the lessor to divest himself of the possession of

<sup>1</sup> Tiedeman on R. P., §§ 178-772; Taylor's Land. & Ten., §§ 14-28; Fisher v. Milliken, 8 Pa. 111; B. & W. L. C. 416.

<sup>2</sup> Moore v. Miller, 8 Pa. St. 272; B. & W. L. C. 416; Tiedeman R. P. 178.

the property and the intention of the lessee to receive and hold the same, will be sufficient.<sup>1</sup> A lease for life, or one intended to include the usual covenants, should be under seal,<sup>2</sup> but one for years or a less term may be in writing not under seal,<sup>3</sup> or by a verbal agreement only, unless the statute of the State forbids,<sup>4</sup> but, in either case, the agreement must be based upon a valuable or good consideration,<sup>5</sup> although it is not always necessary that the amount of the consideration should be fixed.<sup>6</sup>

§ 111. **Agreement for future lease.** — It is frequently difficult to determine whether an instrument is a present lease, or a mere contract for a future lease. In a present lease the parties are bound by the implied as well as the express provisions of the lease, and parol evidence is not

<sup>1</sup> *Blan. & Weeks Ltd. Cas.*, pp. 416-417; *Daniel v. Gracie*, 6 Q. B. 145; 13 L. J. N. S. 809. Vague, indefinite and uncertain language would give way to definite and certain terms used. *Allison v. Luhrig Coal Co.*, 22 Ohio Cir. Ct. Rep. 489; *Michaels v. Fishel*, 169 N. Y. 881.

<sup>2</sup> *Taylor's Land. & Ten.*, § 84; *Doe v. Brown*, 8 East, 165; *Roe v. Conroy*, 74 N. Y. 201.

<sup>3</sup> Statutes different States. See Sess. Acts of Mo. for 1893, abolishing the necessity for all private seals.

<sup>4</sup> *David v. Gracie*, *supra*. See, however, *Desloge v. Pierce*, 38 Mo. 588. For verbal lease, held to support trespass, see *Ganter v. Atkinson*, 9 M. M. R. 18; *Clegg v. Jones*, 7 M. M. R. 572.

<sup>5</sup> 3 Kent's Com. 462; *Taylor's Land. & Tenant*, §§ 152-153, pp. 162-163; *Dean v. Cartright*, 4 East, p. 29; *MacFarlane v. Williams*, 107 Ill. 33.

<sup>6</sup> *Dean v. Cartright*, *supra*; 3 Kent's Com. 462; *Taylor's Land. & Ten.*, *supra*. The consideration of an oil and gas lease, with a granting clause, an *habendum* clause, a condition subsequent, and a surrender clause, applies to the whole lease and to each clause thereof. *Brown v. Fowler* (Ohio), 63 N. E. Rep. 76. The terms "demise," "lease," "let," etc., will not change a sale of mineral in place to a lease. *Lehigh & C. Coal Co. v. Wright*, 177 Pa. St. 387; 35 Atlantic Rep. 919. Intent, not form, would determine character of the instrument. *Watson v. O'Hara* (Pa.), 8 M. M. R. 333. *Dicta*, as to farm leases are inapplicable to mining leases, as the latter are practically sales of the *corpus* of the land. *Gowan v. Christie*, 8 M. M. R. 688.

admissible to show the intention of the parties,<sup>1</sup> while an agreement for a future lease can be changed or altered, so as to conform to the intention of the parties, and until the agreement goes into effect, the parties would not be bound by the implied covenants.<sup>2</sup> Parol evidence is admissible, however, to explain the meaning of a mining term, and sometimes to supply an omission in a mining lease.<sup>3</sup> The

<sup>1</sup> Tiedeman on R. P., § 179, p. 113; Taylor Land. & Ten. 37-41.

<sup>2</sup> 1 Washburn R. P. 453; Tiedeman R. P. 179; Taylor's Land. & Ten., *supra*. See also Morgan v. Morgan, 14 L. J. (N. S.) C. P. 5; Shaw v. Wallace (1 Dutch. N. J. 453), where an agreement to work at a certain price was held not to be a lease. Also Kyse v. Powell, 2 El. & B. 232; s. c. B. & W. L. C. 417. "Defendant granted plaintiff a portion of oil and minerals in defendant's land, providing that the grant should be void if no well was begun within four months. The day before the lease expired, plaintiff hauled and placed a load of lumber on the land, and made defendant an offer for an extension of the lease, but no agreement was reached, though the offer was not positively declined. The day after the lease had expired plaintiff hauled lumber to the premises, and was refused admission. Held, that it was error to refuse to instruct that, if plaintiff expended money and labor with defendant's consent on the two days mentioned, defendant was estopped from denying that plaintiff had complied with the contract, as the issue of estoppel was not raised by the evidence." Forney v. Ward et al., 62 S. W. Rep. 106 (Court of Civil Appeals of Texas, April 4, 1901). On account of the fluctuating value of mineral, if operations are not commenced under lease, by the time stipulated, this avoids the lease. Kinsman v. Jackson, 42 L. T. (N. S.) 558; Elk Fork Oil Co. v. Jennings, 84 Fed. Rep. 839; Foster v. Oil Co., 90 Fed. Rep. 178; Huggins v. Dally, 99 Fed. Rep. 606; Lambie v. Iron Co., 118 Ala. 427; Columbian Oil Co. v. Blake, 13 Ind. App. 680; Oliver v. Goetz, 125 Mo. 370; Fisher v. During, 53 Mo. App. 548; Robinson v. Boys, 61 N. J. L. 179; Eaton v. Gas Co., 122 N. Y. 416; Maxwell v. Todd, 112 N. Car. 677; Detlor v. Holland, 57 Oh. St. 492; Mathews v. Nat. Gas Co., 179 Pa. St. 165; Henderson v. Ferrell, 183 Pa. St. 547; Pet. Co. v. Coal Co., 89 Tenn. 381; Cowan v. Iron Co., 83 Va. 547; Crawford v. Ritchey, 43 W. Va. 252; Federal Oil Co. v. West Oil Co. (Ind. 1902), 112 Fed. Rep. 373; 20 Am. & Eng. Enc. Law (2 Ed.), 781. And a failure to find oil or gas in paying quantities, avoids lease. Venturè Oil Co. v. Frets, 153 Pa. St. 451; Steelsmith v. Gartlan, 45 W. Va. 27; N. W. Oil & Gas Co. v. Tiffin, 59 Oh. St. 420. And for meaning of "paying quantity," see Young v. Forest Oil Co., 194 Pa. St. 248; 20 Am. & Eng. Enc. Law, p. 781.

<sup>3</sup> MacSwinney on Mines, 233 n; Reamer v. Nesmith, 34 Cal. 624;



presumption in such cases is in favor of construing the instrument to be a present lease instead of a contract for a future one,<sup>1</sup> and it has been held that an agreement to give a mining lease in the future, does not operate to transfer the title, and cannot authorize an entry for any purpose until the lease is executed.<sup>2</sup>

§ 112. When lease goes into effect.—A tenancy for years must necessarily have a fixed beginning and unless some certain time is referred to for the commencement of the tenancy, the lease would be held void for uncertainty.<sup>3</sup> An estate for life, however, needs no fixed beginning, for it cannot commence *in futuro* and its duration cannot be ascertained.<sup>4</sup> When the tenancy is to take effect from a day that is past, the lease goes into effect from that day, but the interest of the lessee does not attach until

Clayton v. Greyson, 5 Ad. & El. 302; Gerrens v. Huhn & Co. Min. Co., 10 Nev. 137.

<sup>1</sup> And particularly if nothing further remains to be done by the parties. Kabley v. Worcester Gas Co., 102 Mass. 394. Or if there are proper words of present demise. Tiedeman R. P., p. 114. And note Thornton v. Payne, 5 Johns. 74; Aldermen v. Neste, 4 M. & W. 719; Poole v. Bently, 12 East, 168; Aiken v. Smith, 21 Vt. 172. See Chicago & Co. Oil & Min. Co. v. U. S. Pet. Co. (57 Pa. St. 83), where an exclusive contract to bore and collect oil for a term of years and to lease same therefor, was held a present lease. 12 M. M. R. 570.

<sup>2</sup> Doe v. Powell, 8 Scott N. R. 687; 7 M. & G. 980; Taylor's Land. & Ten. 30-31; Blan. & Weeks Ld. Cas. 417; Kyse v. Powell, 2 El. & B. 272; Shaw v. Wallace, 1 Dutch. N. J. 453. An oil lease providing for prospective royalty, but without a covenant to diligently bore for oil, is void, being without consideration. Steelsmith v. Gartian, 45 W. Va. 27; 44 L. R. A. 107; 29 S. E. Rep. 978. And if the lease is to commence in the future, mere possession of the lease will not confer title to the mineral on the lessee, before an entry into possession, and he could not maintain trespass for mineral removed. Austin v. Huntsville Coal & Min. Co., 72 Mo. 535; Laing v. Holmes, 98 Mo. App. 281.

<sup>3</sup> Patterson v. Hubbard, 30 Ill. 201; Reed v. Lewis, 74 Ind. 433; Taylor L. & T. 70.

<sup>4</sup> Taylor Land. & Ten., *supra*; Austin v. Coal & Min. Co., 72 Mo. 535.

delivery of the instrument.<sup>1</sup> If the commencement of the term is specified for in the lease it will be held to commence from the date of the lease, and if the lease contains no date, from the time of its delivery.<sup>2</sup> The payment of royalty will operate generally to fix the commencement of a tenancy,<sup>3</sup> unless by statute the acceptance of rent is held not to constitute a waiver of the lessor's right to terminate the tenancy,<sup>4</sup> and a receipt for royalty is *prima facie* evidence of the commencement of the tenancy either from the date of the receipt, or at a time previous to that date.<sup>5</sup> An impossible date for the commencement of the tenancy is the same as no date at all, and the lease goes into effect on delivery.<sup>6</sup> A tenancy can be predicated upon the happening of a contingency, provided the contingency is sure to happen,<sup>7</sup> but where the duration of the tenancy is uncertain, as on a failure to specify the date of its termination, the court would be unable to determine the duration of the tenancy, and this would render the lease void.<sup>8</sup>

§ 113. Parties to a lease. — The lease should always contain the names of the parties and if it is executed by an agent of the lessor, the lease should run in the

<sup>1</sup> Moore v. Musgrove, Hob. 18; Enys v. Dormithorn, 2 Burr. 1192; Taylor Land. & Ten., p. 82. And an entry thereunder. Austin v. Coal Co., *supra*.

<sup>2</sup> Livingston v. Sage, 95 N. Y. 289; Taylor Land. & Ten., § 68.

<sup>3</sup> Taylor Land. & Ten., § 69, p. 80.

<sup>4</sup> See Sta. of Mo. for 1899, under "Mines & Mining."

<sup>5</sup> Doe v. Johnson, 6 Esp. 10; Taylor Land. & Ten., *supra*.

<sup>6</sup> Co. Lit. 46A.; Jackson v. Bard, 4 Johns. 230; Edge v. Strafford, 1 C. & J. 391; Huffman v. McDaniel, 1 Oregon, 259.

<sup>7</sup> Goodright v. Richardson, 3 F. R. 462.

<sup>8</sup> Huffman v. McDaniel, 1 Oregon, 259. See as to this distinction Taylor L. & T., § 71.

name of the principal and the intended lessee.<sup>1</sup> If the lease runs in the name of the agent, he and not the principal is bound by the covenants of the lease.<sup>2</sup> It is not necessary to insert the middle name of either party to the lease;<sup>3</sup> and a variance in the name of a corporation will not affect the validity of the lease,<sup>4</sup> but when the lease is under seal it will be void if the name of the lessee is not filled in before delivery.<sup>5</sup> The general rule as to parties under disability applies to leases the same as to other contracts. No express ratification is necessary in order to bind an infant on a lease, after he has attained his majority,<sup>6</sup> but some express act of disaffirmance on his part is required in order for him to avoid the lease;<sup>7</sup> and although at common law a married woman could not lease her property without the concurrence of her husband, under the statutes of very many of the States she can now lease or otherwise control her separate property without the consent of her husband.<sup>8</sup> And a corporation, like a natural person, can either grant or take a lease, unless it is restricted by its charter from so doing, but the lease should run in the corporate name and be signed by the officers or agents of the corporation who are duly authorized.<sup>9</sup>

<sup>1</sup> Taylor's Land. & Ten., §§ 137-142.

<sup>2</sup> Schaefer v. Henkle, 57 How. Pr. 97; Samuel v. Scott, 13 Phil. 64. And adding the word "agent" in such case does not alter the rule. Seyfert v. Blow, 83 Pa. 450.

<sup>3</sup> Taylor Land. & Ten., *supra*.

<sup>4</sup> McCarthy v. Noble, 5 N. Y. 380.

<sup>5</sup> See the leading case of Hibblehite v. McMorrill, 6 M. & W. 200; Simms v. Harvey, 19 Iowa, 200; Chauncey v. Arnold, 24 N. Y. 330.

<sup>6</sup> Kline v. Bebee, 6 Conn. 494; Richardson v. Boright, 9 Vt. 368; Worcester v. Eaton, 13 Mass. 371.

<sup>7</sup> Vorhies v. Vorhies, 24 Barb. 150.

<sup>8</sup> See married woman's acts in different States; Knapp v. Smith, 27 N. Y. 277; Taylor's Land. & Ten., §§ 101-107.

<sup>9</sup> For a full discussion of leases by corporations, see Angell & Ames on Cor. 60; s. c. Taylor L. & T., § 126.

§ 114. **Same — Partners and tenants in common.** —

The general law of partnership, governing trade property held by the firm, does not apply to real estate owned by copartners, for as to such property the members of the firm are tenants in common, even though the land is used for the purpose of their business.<sup>1</sup> As in the case of tenants in common, each partner must demise according to his estate, and there may be separate covenants for the payment of the rent or royalty to each of the lessors, or they may make a joint demise, with but one render of the entire royalty to all, in which case they may all join in an action for the rent, or sue separately at their option.<sup>2</sup> But there may be a partnership in the use of land for mining purposes the same as in ordinary commercial transactions. and although in buying and selling the land each associate is held to contract for himself,<sup>3</sup> where the property is purchased for the use of the firm and is used for partnership purposes, the real estate would be considered as property of the partnership.<sup>4</sup> One tenant in common may contract with his associates and can lease them his part of the estate, and after the execution of the lease the lessees are entitled

<sup>1</sup> *Roheburg v. Reed*, 57 Mo. 392; *Eaton's App.*, 66 Pa. St. 483; *Coles v. Coles*, 15 Johns. 159; *Palmer v. Sawyer*, 114 Mass. 19; *Mitchell v. Read*, 61 Barb. 310.

<sup>2</sup> *Taylor's Land & Ten.*, §§ 115-116. If the royalty is reserved separately to each, however, they must each bring a separate action. *Ante, idem*. See also *Powls v. Smith*, 5 B. & A. 850. See *Dresser v. Dresser* (40 Barb. 800), for lease of one cotenant to his partner of his interest in the common estate. A tenant of one co-owner may sue in trespass for ore removed by him and converted by another co-owner. *Blewett v. Coleman*, 40 Pa. St. 45; *McCord v. Oakland I. M. Co.*, 64 Cal. 134; 49 Amer. Rep. 686; 11 M. M. R. 160.

<sup>3</sup> *Ante, idem*; *Cunningham v. Pattee*, 99 Mass. 248; see also *Dillon v. Brown*, 11 Gray, 179.

<sup>4</sup> *Buchon v. Summer*, 2 Barb. 199; *Dyer v. Clark*, 5 Metc. 562; *Howard v. Priest*, 5 Metc. 582; *s. c. B. & W. L. C.* 561.

to all the profits from the land;<sup>1</sup> and in like manner one partner can convey his interest to the remaining members of the firm;<sup>2</sup> but one partner cannot demise the real estate of the firm, and even if the instrument were executed in the firm's name, it would only convey that partner's interest.<sup>3</sup> This was the established rule at common law,<sup>4</sup> but it has now been changed by the law merchant, and the deed of one partner will bind the other member of the firm, if such partner has either an express or implied authority to execute

<sup>1</sup> *Dresser v. Dresser*, *supra*; *Reed v. Spicer*, 4 M. M. R. 330; *Nat. Bank v. Bissell*, 11 M. M. R. 546.

<sup>2</sup> *Ante, idem*; *Wilde v. Milne*, 26 Beav. 504. See in case of partner's death, *Clements v. Hall*, 24 Beav. 333.

<sup>3</sup> *Dillon v. Brown*, 11 Gray, 179. See for case of one partner handling partnership property, *Levi v. Karwick*, 13 Iowa, 344; *B. & W. L. C.* 585. "Where one of the owners of land in common executes a lease of the mineral rights in the entire tract, the conveyance is not void, but passes the interest of the grantor." *Harlan et al. v. Central Phosphate Co. et al.*; *Court of Chancery Appeals of Tennessee*, 62 S. W. Rep. 614. In this case the court considered the authorities, at length, on the right of cotenant to execute a lease of the whole tract, and concludes: "Such conveyances or transfers can in nowise interfere with the rights of the parties not participating. The effect of the transaction simply is that the selling tenant divides up his interest into several parcels, but in the subsequent division the nonselling tenant is entitled to his half, if he is a half owner, just as though there had been no such subdivision made by his cotenant." And the following cases, cited, seem to support the holding of the court: *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593; 28 Pac. 45; *Barnum v. Laudon*, 25 Conn. 137; *Harms v. McCormick*, 132 Ill. 104; 22 N. E. 511. On the general question, see, also, *Paul v. Cragnas (Nev.)*, 59 Pac. 857; 47 L. R. A. 540; and *Mott v. Underwood (N. Y. App.)*, 42 N. E. 1048; 32 L. R. A. 270-272. But, upon the contrary, many reputable authorities hold that a conveyance by a cotenant of an aliquot part of the estate is void. *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; 13 M. M. R. 225; *Bartlett v. Harlow*, 12 Mass. 348; *Varnum v. Abbott*, 12 *Idem.* 474; *Blossom v. Brightman*, 21 Pick. 383; *Benedict v. Torrent (Mich.)*, 47 N. W. 129; *Talnter v. Cole*, 120 Mass. 162; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Smith v. Benson (Vt.)*, 31 Am. Dec. 614.

<sup>4</sup> *Dillon v. Brown, supra*; *Taylor's Land. and Ten.*, § 117; *Harrison v. Jackson*, 7 T. R. 207.

such deed,<sup>1</sup> and it has been held that this authority could be implied from the character of the business and the general scope of each partner's authority.<sup>2</sup>

§ 115. **Same — Corporation as party.**— A mining corporation, through its directors, may lease and otherwise dispose of its real estate in like manner as an ordinary partnership or a natural person.<sup>3</sup> A majority of the directors are competent to bind the whole.<sup>4</sup> At common law corporations could only act by their corporate seal, and hence could not be bound by parol contracts of their agents.<sup>5</sup> This doctrine has long since been exploded, however, and corporations, like other principals, are bound by the acts of their authorized agents, whether they contract with or without the corporate seal.<sup>6</sup> They are placed upon the same footing in regard to their manner of contracting as natural persons and may likewise be bound by the parol leases of their agents.<sup>7</sup>

<sup>1</sup> *Eaton's App.*, 66 Pa. St. 483; *Skinner v. Dayton*, 19 Johns. 513; *Hart v. Withers*, 1 Penn. 285.

<sup>2</sup> *Butler v. Stocking*, 8 N. Y. 408; *Taylor's Land. and Ten.*, § 117 and note to page 127. A life-tenant cannot lease land for mineral purposes. *Gerkins v. Ky. Co.*, 100 Ky. 784; 39 S. W. Rep. 444. An oil and gas lease joined in by life tenant and remainderman, grants right to lessee to mine oil. *Blakely v. Marshall*, 174 Pa. St. 435; *Wilson v. Youst*, 28 S. E. Rep. 781.

<sup>3</sup> *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 84; *Penn. R. R. v. Sly*, 65 Pa. St. 85, 205; *Ardesco Oil Co. v. N. A. Oil Co.*, 8 M. M. R. 590.

<sup>4</sup> *Angell & Ames on Cor.*, § 291.

<sup>5</sup> *Taylor's Land. & Ten.*, § 127; *Ang. & A. on Cor.*, *supra*.

<sup>6</sup> *Taylor's Land. & Ten.*, *supra*; *Durham v. Carbon Co.*, 15 M. M. R. 380; *So. Ireland Co. v. Waddle*, 8 M. M. R. 533.

<sup>7</sup> *Ante, idem.* *U. S. Bank v. Danbridge*, 12 Wheat. 105. "Under Code 1858, § 1474, giving to all private corporations the power to hold and purchase and dispose of real and personal property to the extent prescribed by law, and, if not limited by law, to such an amount as the business of the corporation requires, the objection that a lease by a corporation was in excess of its corporate privileges could not be raised by the lessee, but only by the State. Acts 1887, c. 198, entitled 'An act to empower corporations to lease and dispose of their property and fran-

But though they can execute parol leases without the use of the seal, in all cases where the seal of an individual would be necessary, the seal of the corporation must also be attached, and in order to authenticate the instrument the corporate seal must be proved in the same manner as the seal of an individual, by one who knows it to be the corporation's seal.<sup>1</sup> The seal must also have been affixed by an officer of the corporation who was authorized to execute the instrument,<sup>2</sup> in order to make it an act of the corporation; but when a seal has once been affixed to a written instrument the presumption is that it was affixed by an officer of the corporation having the requisite authority to execute the instrument, and the one denying the execution of the same must overcome this presumption by showing that there was a want of authority in the person affixing the seal.<sup>3</sup>

§ 116. Continued — When executed by agent. — What one can do himself he can also do through the agency of

chises,' and by its terms applying to 'all corporations now or hereafter existing under the laws of the State,' and requiring leases to be made only by vote of the majority of stock at a meeting, of which 60 days' notice had been published, and exacting the same formalities on the part of the lessee if it was a corporation, even if applicable to private corporations, applied only to leases of property essential to corporate integrity or existence, and to the exercise of the functions for which the corporation was chartered; and a failure to comply therewith did not render void a lease of 2,800 acres of land by a coal company owning 75,000 acres, only 16,000 of which were covered by other leases." "Private corporations possess the power, under the common law, to lease and sell property by a majority of its stockholders." *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co.* (Supreme Court of Tennessee, March 26, 1903), 62 S. W. Rep. 162.

<sup>1</sup> *Derby Canal Co. v. Wilmot*, 9 East, 360. But a seal is not required in the case of trading corporations, contracting for the purposes for which they are formed. *South of Ireland C. Co. v. Waddle*, L. R. 4 C. P., affirming *s. c.* 3 *Id.* 463.

<sup>2</sup> *Jackson v. Campbell*, 5 Wend. 572; *Derby Canal Co. v. Wilmot*, *supra*.

<sup>3</sup> *Clarke v. Improvement Gas Co.*, 4 B. & Ad. 315.

others. If one has such an estate in land as will enable him to execute a lease of the same, he can delegate that authority to an agent and the lease would be equally binding as though executed by the principal himself.<sup>1</sup> But in all cases where one is charged upon a written instrument not executed by himself, the law will strictly regard the execution of the instrument,<sup>2</sup> and before a lease executed by an agent will be valid, he must either have the authority necessary to enable him to perform such an act, or it must be subsequently ratified by his principal.<sup>3</sup> He must execute the lease in the name of his principal, in order to charge the principal, and if the lease is executed in the name of the agent alone, he alone will be liable on the covenants.<sup>4</sup> All that is necessary, however, is that he should have the lawful authority to execute the lease, and it is not necessary that this authority should be given in writing, for his appointment may either be directly proved by a verbal or written authority, or it may be indirectly established by showing the nature of the employment and the relative situation of the parties, as well as by a subsequent ratification by the principal.<sup>5</sup> But a parol authority would not be sufficient to enable an agent to execute an instrument under seal for his principal, for in such cases the authority must be of as high a character as the instru-

<sup>1</sup> See generally for agent's authority to execute lease, *Taylor's Land. & Ten.*, §§ 137-142.

<sup>2</sup> *Ante, idem*; *Long v. Colburn*, 11 Mass. 97; *Townsend v. Hubbard*, 4 Hill, 357.

<sup>3</sup> See, as to authority, *Shep. Touch.* 270; cited in *Taylor's Land. & Ten.*, § 137. Knowledge by the principal is generally a sufficient ratification to bind him. *Kingman v. Pierce*, 17 Mass. 247.

<sup>4</sup> And if executed in agent's name, the mere addition of the word "agent" or "atty." is *descriptio personam*. *Seyfert v. Bean*, 83 Pa. St. 450.

<sup>5</sup> *McLain v. Doe*, 5 Ind. 237; *Kingman v. Pearce, supra*; *Wilks v. Back*, 2 East, 142; *Brehn v. Jersey City F. Co.*, 38 N. J. 74.



ment to be executed and to execute a lease under seal, the authority of the agent must also be under seal.<sup>1</sup>

§ 117. **Lessor must have possession.**—It is absolutely necessary, under the prevailing statutes, that the lessor should have the actual or legal possession of the premises to be conveyed, and if the premises are in the actual possession of an adverse claimant a lease by the owner would be absolutely void, unless it were delivered as an escrow, to take effect when he should enter and recover the possession of the premises.<sup>2</sup> But when a seisin is once shown to exist, it is always presumed in law to continue, and this presumption is carried to such an extent, that one in the actual possession of a tract of land, although his possession may not be legal, can make a valid lease and the same can only be avoided by the eviction of the disseisor by the party holding the paramount title.<sup>3</sup> It is not necessary, however, that the lessor should have the actual possession of the premises, in order for him to make a valid lease of the same, provided he has the right to take possession, or what is generally termed possession in law.<sup>4</sup> All that is necessary is that the lessor should have an absolute right of entry on the premises, hence, an heir can lease land that he has acquired by descent, or a remainderman can make a valid lease of land to which he has a present title, even before an actual

<sup>1</sup> Story on Agency, § 49. And see also Ewell's Evans on Agency, 119 n, 145 n.

<sup>2</sup> Taylor's Land. & Ten., § 85; Vorick v. Jackson, 2 Wend. 166; Smith v. Burtis, 6 Johns. 197; Austin v. Huntsville Coal & Mining Co., 72 Mo. 535.

<sup>3</sup> Redfield v. Utica & c. Ry. Co., 25 Barb. 54; Lee v. Norris, Cro. El. 331; Thurston's Case, Owen, 16; Taylor L. & T. *supra*.

<sup>4</sup> Generally, the undisputed right of possession is all that is necessary in the lessor. Taylor's Land. & Ten., § 86; Hoyt v. Dillon, 19 Barb. 644.

entry, and although the tenant, or owner of the particular estate, is still in possession of the premises.<sup>1</sup>

§ 118. **How lease may operate by estoppel.** — It is not only necessary that one should have possession, but he should also have a title to the premises, in order to make a valid lease. But one can make a valid lease of premises of which he is in actual possession, although the title to the land is in another, and the lease which would otherwise have been avoided by the eviction of the lessor, will be made good by estoppel, if the disseisor afterward acquire title to the premises conveyed, during the continuance of the lease,<sup>2</sup> and where land is leased for a term of years, and the lease cannot operate because of a prior lease of the same premises, the second lease will take effect by way of estoppel for as much of the term as remains in the lessor, after the termination of the prior lease.<sup>3</sup> But a lease will not take effect under the doctrine of estoppel, where the lessor's want of title appears upon the lease itself,<sup>4</sup> and although

<sup>1</sup> *Hall v. Benner*, 1 Pa. 62; *Kinsman v. Greene*, 16 Me. 60; *Taylor's Land. & Ten.*, *supra*. See as to right to royalty as between life tenant and remainderman. *Bassett v. Bassett*, 14 M. M. R. 359; *Briggs v. Davis*, 14 M. M. R. 585; *Lynn's App.*, 15 M. M. R. 126.

<sup>2</sup> *Luxton v. Stephens*, 3 P. Wms. 373; *Lowes v. Skinner*, 3 Pick. 52; *Austin v. Ohearn*, 61 N. Y. 6; *Taylor's Land. & Ten.*, p. 98; citing *Jackson v. Murray*, 12 Johns. and other cases. "Where the grantor in a deed conveying the coal under her land stood by for 12 or 15 years and permitted appropriation of a portion of the surface, she was not entitled to enjoin the removal of improvements." *Potter v. Rend* (Pa.), 50 Atl. Rep. 821. See as to claim to property, after assisting in leasing it. *Stewart v. Munford*, 91 Ill. 58; 5 M. M. R. 555. And for case where estoppel operated against the lessee, see *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; 26 Amer. Rep. 784; 5 M. M. R. 536.

<sup>3</sup> *Gilman v. Hoare*, 1 Salk. 275.

<sup>4</sup> *Hermitage v. Tompkins*, 1 Ld. Ray. 729. And see also *Taylor's Land. & Ten.*, § 90; 88. But where estoppel will operate it binds not only the owner, but also his purchaser and privies of estate with him. *Sturgeon v. Wingfield*, 15 M. & W. 324.

an heir of the lessor, or other person who derives title under him, will be equally bound by the conditions of the lease, such a lease, by a tenant for life, will not extend beyond his life and bind his heirs, even though he subsequently purchases the reversion before his death.<sup>1</sup>

§ 119. **Recitals and construction of lease.**— The premises to be granted by the lease should be described with reasonable certainty and the land to be conveyed, together with such things as are directly incident thereto, or necessary to its enjoyment, should be especially mentioned in the conveyance, as they pass by implication with the land, unless expressly reserved in the lease.<sup>2</sup> But an easement will not pass by implication, in a conveyance of land, unless it is necessary to the enjoyment of the land itself,<sup>3</sup> and although recitals in a lease may sometimes operate by way of estoppel, an erroneous recital is generally held immaterial, unless it shows that the lessor had no interest in the subject-matter of the demise.<sup>4</sup> The recitals in a lease should always be construed according to the intention of the parties, and if necessary a word can be inserted or omitted in order to effectuate such intention.<sup>5</sup> Where the language of an exception or recital is uncertain, it will be construed, generally, in favor of the lessee.<sup>6</sup> But the power to revoke

<sup>1</sup> Taylor's Land. & Ten., § 91; *Blake v. Foster*, 8 T. R. 487. A life tenant cannot lease land for oil or gas. *Gerkins v. Ky. Salt Co.*, 100 Ky. 784; 89 S. W. Rep. 444.

<sup>2</sup> *Rood v. N. Y. & E. Ry. Co.*, 18 Barb. 80; *Plevey v. Skinner*, 116 Mass. 129; *Mott v. Palmer*, 1 N. Y. 564.

<sup>3</sup> *Manning v. Smith*, 6 Conn. 289. And a way of necessity would exist only so long as the necessity continues. *Osborne v. Wise*, 7 C. & P. 761.

<sup>4</sup> *Hermitage v. Tomkins*, 1 Ld. Ray. 729.

<sup>5</sup> Taylor's Land & Ten., § 150; *Jackson v. Streeter*, 5 Cow. 529. But see as to the insertion of terms to effectuate the intention of parties, 1 Greenl. Ev. 267.

<sup>6</sup> Taylor's Land & Ten., § 158, p. 168.

a lease gives the lessor power to revoke it at any time, and a proviso that the term shall cease on the failure of the lessee to pay rent or royalty, merely gives the lessor power to determine it on such failure and the lessee does not possess such an option.<sup>1</sup>

§ 120. *Same — Parol evidence to explain.* — Parol evidence is always admissible to explain a mining term, in accordance with the rules of evidence relating to other written contracts.<sup>2</sup> Where the description is faulty, extrinsic evidence is competent to apply the instrument to its subject,<sup>3</sup> or to supply omissions in the agreements or covenants of the lease that the parties, at the time of making the contract, may have overlooked,<sup>4</sup> and to explain latent ambiguities and local terms,<sup>5</sup> as well as to prove local customs and usages prevailing in the section,<sup>6</sup> and with reference to which the parties are presumed to have contracted.<sup>7</sup> But it is not competent in a suit on a covenant of a min-

<sup>1</sup> *Taylor's Land & Ten.*, 112 *et sub.* Owing to the peculiar nature of oil and gas, and the susceptibility to drainage by surrounding wells such leases are construed most strongly against the lessee and for the protection of the lessor. *Higgins v. Dally*, 99 Fed. Rep. 606; 48 L. R. A. 320. And a clause permitting lessee to surrender term, at his option, makes lease void, for want of mutuality, *Eclipse Oil Co. v. Penn. Oil Co.* (W. Va. '99), 34 S. E. 928; *Nat. Oil & Pipe Line Co. v. Teel* (Texas, 1902), 67 S. W. Rep. 545. But see *Brown v. Fowler* (Ohio, 1902), 68 N. E. 76; 20 Am. and Eng. Enc. Law (2 Ed.), 785.

<sup>2</sup> *Hutchinson v. Bawker*, 5 M. & W. 585; 1 Greenl. Evid., Sec. 295; 277; 280; 2 Stark. Evid. 566.

<sup>3</sup> *Noonan v. Lee*, 2 Blk. (W. L.) 499; *Calbourn v. Dawson*, 1 C. B. (70 Eng. C. L.) 765.

<sup>4</sup> *Hutton v. Warren*, 1 M. & W. 474; *Wiggleworth v. Dallison*, 1 Doug. 201.

<sup>5</sup> *Fisher v. Dibert*, 54 Pa. St. 460.

<sup>6</sup> *Jenny Lind Co. v. Bowers*, 11 Cal. 194; *Chester Emery Co. v. Lucas*, 112 Mass. 424. But see *Clayton v. Greyson*, 50 Ad. & E. 302; *Brain v. Harris*, 24 L. J. N. S. Ex. 177.

<sup>7</sup> *Desloge v. Pearce*, 38 Mo. 588, and English cases cited.

ing lease, to introduce evidence of a verbal agreement made at the time of the execution of the lease, but differing from the covenant in the lease,<sup>1</sup> although a subsequent oral modification of the covenant would constitute a valid subsisting contract.<sup>2</sup> A general meaning is not sufficient evidence of the local meaning of a mining term,<sup>3</sup> and parol evidence is generally only admissible to explain ambiguities, local terms and customs, and for the purposes above enumerated, and unless some of these exist, it is properly excluded by the court.<sup>4</sup>

§ 121. **Warranties in a lease.**—The parties to a mining lease are held to have contracted with reference to the state of things existing at the time the lease was made, and without some express covenant, aside from those which are incident to the nature of the contract, the lessee cannot complain that the circumstances were different from what he had expected to find them, and unless the transaction was tainted with fraud, he could not introduce parol evidence to show that the lessor had represented things to be in a different condition, for the instrument itself is the best evidence of the transaction.<sup>5</sup> The lessee, of course, has a right to rely on the existence of the subject-matter,

<sup>1</sup> *Lyon v. Miller*, 24 Pa. St. 392; *s. c.* B. & W. L. C., p. 422.

<sup>2</sup> *Bishop on Con.*, § 767 and cases cited.

<sup>3</sup> *Houghton v. Gilbert*, 7 C. & P. 701; 1 Greenl. Evid., Sec. 295; 2 Stark. Evid. 566.

<sup>4</sup> *Fisher v. Deibert*, 54 Pa. St. 460; *Pennyman v. Winner*, 2 M. M. R. 448; *Fitch v. Archibold*, 2 M. M. R. 555; *Burr v. Spencer*, 8 M. M. R. 450.

<sup>5</sup> *Gowan v. Christie*, 5 Mook, 114; L. R. 2 L. C. App. 273; *Pearson v. Martin*, 38 Wis. 265. But see as to exhausted mine, *Murdock v. Fullerton*, 5 Mook, 414; L. R. 2 L. C. App. 273; *Phillips v. Jones*, 9 Sim. 519, as to incumbrance, *Stombaugh v. Smith*, 23 Ohio St. 585, and as to quality, *Fort Scott C. & M. Co. v. Sweeney*, 15 Kansas, 244. "Where a mining lease fixed a minimum amount of coal which the lessee was required to mine or to pay royalty on, the fact that in several settlements for roy-

but without an express warranty, he takes it as he finds it, and subject to all the risks of failure and depreciation in value.<sup>1</sup> But where there is an express warranty, he has, by implication, all the privileges necessary for the enforcement of his right, and a lease which gives the lessee the right to take out all the mineral beneath a certain surface, is held to confer the right to make the necessary openings to reach the mineral, provided this did not interfere with the rights of the surface owner.<sup>2</sup>

§ 122. **Same — What acts constitute a breach.** — Just what acts will constitute a breach of warranty in a mining lease depends essentially upon the language of the warranty and the matters to which it pertains. The mere statement of quality of a particular metal described will not amount to a warranty that such metal is of the quality mentioned, for this is a mere statement of opinion, and the lessee takes subject to his own risk;<sup>3</sup> but without express words of

alty on coal mined the lessor accepted the royalty on merely the actual amount mined, without demanding the royalty due by the lessee's failure to mine the minimum amount fixed, did not show that the sum stipulated was regarded by the lessor as a penalty, instead of liquidated damages; since such amount became a fixed legal liability on the part of the lessee on failure to mine the amount prescribed, and the lessor was not bound to demand it at any certain time." *Coal Cr. M. & M. Co. v. Tenn. C. & I. Co. (Tenn.)*, 62 S. W. Rep. 162. No warranty of quality will result, unless clearly intended from language used. *Carondelet Iron Works v. Moore*, 78 Ill. 65; 2 M. M. R. 625.

<sup>1</sup> *Fort Scott C. & M. Co. v. Sweeney*, 15 Kas. 244; *Gowan v. Christie*, *supra*. But see as to existence of subject-matter affecting lessee's liability for rent, *Ridgway v. Sneyd*, 1 Kay, 627; *Millers v. Devonshire*, 16 Beav. 252; *s. c.* 22 L. J. Ch. 810; *Phillips v. Jones*, *supra*.

<sup>2</sup> *Trout v. McDonald*, 83 Pa. St. 144; *Knight v. Ind. C. & I. Co.*, 47 Ind. 105; 17 Am. Rep. 692; *Patton v. Axley*, 5 Jones L. (N. C.) 440; *Lehigh C. & N. Co. v. Harlan*, 27 Pa. St. 429; *Hanson v. Boothman*, 18 East, 32. A lease made subject to a mortgage, makes lessee liable to account to mortgagee for ore taken. *First Nat. Bk. v. Min. Co.*, 89 Fed. Rep. 449. A general warranty is a real covenant running with the land. *Susquehanna Co. v. Quick*, 61 Pa. St. 328; 1 M. M. R. 202.

<sup>3</sup> *Carondelet Iron Works v. Moore*, 78 Ill. 65.

warranty, a warranty of quality may be inferred from the terms used in making the contract.<sup>1</sup> An outstanding parol license to mine revocable at the will of the licensor, is not a breach of a warranty for quiet enjoyment,<sup>2</sup> as such license is revoked by a sale or transfer of the property; but a deed of all the mineral beneath a certain tract would be a breach of a warranty that the land was "free from incumbrances."<sup>3</sup> A lessor's interference with the lessee's right to mine by also excavating portions of the demised premises may constitute a breach of warranty for quiet enjoyment;<sup>4</sup> an assignee, however, who only takes such title as his assignor has, cannot claim a breach of warranty if he afterwards finds the assignor's title was defective.<sup>5</sup>

§ 123. **Covenants and conditions of lease.** — Although classed together and frequently created by the same form of words, there is an important distinction between the conditions and covenants of a lease. Covenants are promises to do or refrain from doing certain things,<sup>6</sup> while conditions are qualifications annexed to the estate of the lessee, by which it may ultimately be defeated or avoided.<sup>7</sup>

<sup>1</sup> *Warren v. Phil. Coal Co.*, 88 Pa. St. 487.

<sup>2</sup> *Gesner v. Cairns*, 2 Allen (N. B.), 595.

<sup>3</sup> *Stambaugh v. Smith*, 28 Ohio St. 585.

<sup>4</sup> *Shaw v. Stenton*, 8 H. & N. 858.

<sup>5</sup> *Johnson v. Mendenhall*, 9 W. Va. 112. An assignee must ascertain, at his peril, whether lease has been forfeited or not. *Carnegie Gas Co. v. Phil. Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Hodgson v. Perkins*, 84 Va. 706; 16 M. M. R. 116; *Washington Nat. Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799; 16 M. M. R. 165.

<sup>6</sup> *Tiedeman R. P.*, § 185, p. 120; *Hayne v. Cummings*, 16 C. B. (N. S.) 426; *Goodwin v. Gilbert*, 9 Mass. 510; *Johnson v. Massey*, 45 Vt. 419; *Maul v. Weaver*, 7 Pa. St. 829.

<sup>7</sup> *Tiedeman on R. P.*, § 191, p. 124. But the presumption is always against the attaching of a condition. *Burnes v. McCubbin*, 3 Kan. 226; *Spear v. Fuller*, 8 N. H. 174. A right of re-entry, attached to a covenant, gives it the force and effect of a condition. *Chamberlain v. Parker*, 45 N. Y. 569; 10 M. M. R. 144.

When a covenant is incident to the nature of the contract, it may be exacted independent of positive stipulation and is said to be implied.<sup>1</sup> Among this class of covenants is the lessors covenant for quiet enjoyment.<sup>2</sup> But when either party is given a right that is not necessarily incident to a complete performance of the contract, the covenant of the opposite party must necessarily be express.<sup>3</sup> For instance, in the lease of a salt well, there is no implied covenant that the well is of any particular productive capacity, and such a promise by the lessor should be expressed in the body of the lease.<sup>4</sup> There is also an important distinction between a condition and a limitation, or what is sometimes called a condition in law. On the breach of a condition the lessor or reversioner must enter in order to determine the estate,<sup>5</sup> while entry is not necessary in the case of a limitation,<sup>6</sup> as the tenancy is determined, *ipso facto*, after the lapse of the period of limitation. The intention of the parties will determine whether the condition is precedent or subsequent;<sup>7</sup> if precedent it must be performed before

<sup>1</sup> Washburn R. P. 487; Maule v. Ashmead, 20 Pa. St. 482; Hamilton v. Wright, 28 Mo. 199.

<sup>2</sup> Mack v. Patchin, 20 N. Y. 167. As to covenant against waste, see Nave v. Berry, 22 Ala. 322.

<sup>3</sup> Aspden v. Austin, 5 Ad. & El. (N. S.) 684; Sheets v. Seldon, 7 Wall. 423.

<sup>4</sup> Clark v. Babcock, 23 Mich. 164. But see as to express covenant to produce certain quantity, Jarvis v. Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41.

<sup>5</sup> Palethorp v. Bergner, 52 Pa. St. 149; Lawrence v. Knight, 11 Cal. 298. See as to acquiescence in the breach, Ireland v. Nichols, 46 N. Y. 418; Adams v. Ore Knob Co., 7 Fed. Rep. 634; 3 M. M. R. 188. But see as to conditions of mining license, in Missouri. Bingo Mining Co. v. Felton, 78 Mo. App. 210.

<sup>6</sup> Tiedeman R. P. 181; Washburn R. P. 23-26; Henderson v. Huntington, 59 Pa. St. 340; Owen v. Field, 102 Mass. 105; Miller v. Levi, 44 N. Y. 489.

<sup>7</sup> Tiedeman on Real Property, § 273, p. 181.



the commencement of the term,<sup>1</sup> and if subsequent it is to be performed after the estate has vested, and the non-performance will operate either to enlarge or defeat the estate of the lessee.<sup>2</sup>

§ 124. **Same—Right to work—Incidental privileges.**—Every lease of mining property should contain an express stipulation, in clear and unequivocal terms, giving to the lessee the right to search for and to dig, work, mine and carry away the mineral, or the particular kinds of mineral demised.<sup>3</sup> From the nature of the property demised and the various circumstances likely to give rise to conflicting rights, as well as the fact that the instrument, or lease, is the only repository of the rights of the parties thereto, the necessity of a specific enumeration and unambiguous statement of the rights of the parties, will be apparent to the reader and practitioner.<sup>4</sup> And as the lease should ex-

<sup>1</sup> Tiedeman B. P. 374. And see as to effect of an illegal condition, where it is precedent to the vesting of the estate, *Martin v. Ballou*, 18 Barb. 119; *Vanhorn's Lessee v. Dorrance*, 2 Dall. 317; *Mizell v. Burnet*, 4 Jones L. 249. And the effect of illegality upon a condition subsequent. *Taylor v. Sutton*, 15 Ga. 103; *Jones v. Doe*, 2 Ill. 276; *Godberry v. Shepherd*, 27 Miss. 203; *Merrill v. Emery*, 10 Pick. 507; *Badlam v. Tucker*, 1 *Id.* 284.

<sup>2</sup> *Van Renssaeler v. Ball*, 19 N. Y. 100; *Waters v. Bidden*, 70 Pa. St. 275; *Ragan v. Walker*, 1 Wis. 527; *Finley v. King's Lessee*, 8 Pet. 340. Implied covenant that land shall be thoroughly tested for oil and gas. *Keppner v. Lemon*, 176 Pa. St. 502. A covenant for the removal of an average of not less than a given number of tons, per year, does not necessitate the removal each year of such quantity. *Oglesby v. Hughes*, 96 Va. 115; 30 S. E. Rep. 439. A covenant to work in a "careful and workmanlike manner" is violated by any kind of work that injures or destroys, or begets injury or decay. *Con. Co. v. Schaefer*, 135 Ill. 210; *Crompton v. Lea*, L. R. 19 Eq. 115; *Thomas Iron Co. v. Allentown Co.*, 28 N. J. Eq. 77; *Lewis v. Fothergill*, 5 Ch. 103; *Quarrington v. Arthur*, 10 M. & W. 335; *Walker v. Tucker*, 70 Ill. 527; *Murray v. Heinz*, 17 Mont. 353; 20 Am. & Eng. Enc. Law (2 Ed.), 779.

<sup>3</sup> *MacSwinney on Mines*, p. 226; *Coppinger v. Gubkins*, 3 J. & L. 410.

<sup>4</sup> *MacSwinney on Mines*, p. 227; *Dugdale v. Robinson*, 3 K. & J. 695; *Coppinger v. Gubkins*, *supra*, where the right to work was held doubtful.

pressly grant to the lessee the right to work the minerals demised, so such incidental rights as would be necessary to enable the lessee to carry out and enjoy this privilege could be properly incorporated in the lease, such as the use of the surface and subsoil;<sup>1</sup> a reasonable use of timber and water and other easements necessary to a full and complete enjoyment of the lessee's rights. But if the lease fails to expressly provide for such rights as these the law would by implication recognize them in the lessee, as incidental to the enjoyment of his express rights and he would have a reasonable use of the surface and subsoil without an express stipulation to that effect.<sup>2</sup>

§ 125. **Manner of working—Particular covenants.**—The duty of working a mine cannot be implied in the absence of an express covenant in a mining lease,<sup>3</sup> and for this reason such a covenant should always be incorporated;<sup>4</sup> but where a lessee has covenanted to work a mine in a specified way or for a certain time, he will be liable on his covenant for a failure to work it, and it matters not that no mineral could be discovered or that his work would

<sup>1</sup> MacSwinney on Mines, p. 227; *Taylor v. St. Helen's*, 6 Ch. D. 278-281.

<sup>2</sup> *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Richards v. Jenkins*, 18 Law Times (N. S.), 438. A mining lease of minerals conveys the right, as an incident, to open shafts to get same. *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665; s. c. 38 Fed. Rep. 677; *Hyatt v. Vincennes Bank*, 113 U. S. 408; *Halley Bank v. George V. B. Min. Co.*, 89 Fed. Rep. 449; *Con. Co. v. Savitz*, 57 Ill. App. 659; *Kokomo Gas Co. v. Albright*, 18 Ind. App. 157; *Oskaloosa Col. v. Fuel Co.*, 90 Iowa, 380; *Byrnes v. Douglas*, 23 Nev. 83; *Oglesby v. Hughes*, 96 Va. 115; 20 Am. & Eng. Enc. Law (2 Ed.), 784.

<sup>3</sup> MacSwinney on Mines, pp. 228-229; *James v. Cochran*, 7 Exch. 170.

<sup>4</sup> *Ante, idem*; *Abinger v. Ashton*, 17 Eq. 370; *Wheatley v. West. & Co.*, 9 Eq. 539, 554.

have been a useless expense.<sup>1</sup> If there is no particular covenant in the lease governing the lessee's mode of working the mine demised, he may work the same in the manner most advantageous to himself, so long as he is not negligent and pays the proper royalty,<sup>2</sup> but if he contracts to work the mine "continuously and without interruption,"<sup>3</sup> "in a proper and workmanlike manner,"<sup>4</sup> or if any covenant is inserted in the lease to govern his manner of operating the mine, he will be bound by the conditions of such covenant and would forfeit his rights thereunder, if forfeiture was the penalty provided for the breach.<sup>5</sup> And where the lease does not provide for a forfeiture, in case of a breach of a covenant to work, the lessor's proper remedy for the breach of such a covenant would generally be an action for damages on the covenant.<sup>6</sup> The courts will not

<sup>1</sup> *Jarvis v. Tomkinson*, 1 H. & N. 195; *Walker v. Jeffries*, 1 Ha. 350-352. See also *Tooley v. Addenbrook*, 13 M. & W. 174. Nor will pumping water save a covenant to work the mine. *Clear Cr. Min. & Mill Co. v. Comstock Gold and Sil. Min. Co.* (Colo. App. 1902), 68 Pac. Rep. 1060.

<sup>2</sup> *Blanchard & Weeks Ld. Cas.*, p. 440; *Wright v. Pitt*, L. R. 12 Eq. 408; *Wheatley v. West. Coal Co.*, 9 Law Rep. Eq. 538; B. & W. L. C. 431.

<sup>3</sup> A covenant to work continuously will not be implied. *Jaegan v. Vivian*, 6 Ch. 757; *Walker v. Jeffries*, 1 Ha. 341-351. Although it was formerly held that it could be, by a reservation of royalty. *Sharp v. Wright*, 28 Beav. 150. But under such a covenant a lessor cannot compel increased working. *Wheatley v. West. Coal Co.*, 9 L. R. Eq. 538; B. & W. L. C. 431.

<sup>4</sup> This term is subject to explanation by evidence of experts. *Lewis v. Fothergill* L. R. 5 Ch. 108, where a working by "instroke" was held a "proper and workmanlike manner." Such a covenant is not violated where no work is performed. *Quarrington v. Arthur*, 10 M. & W. 335.

<sup>5</sup> *Bryan v. Banks*, 4 B. & A. 401; *Roberts v. Davy*, 1 Nev. & M. 443; *Grove v. Donaldson*, 15 Penn. 128; *Tiley v. Meyers*, 25 Penn. 397; *Meyers v. Tiley*, 32 Id. 267; B. & W. L. C. 438.

<sup>6</sup> *Wheatley v. Westminster &c. Coal Co.*, 9 Eq. 554; 2 Dr. & Sm. 347; *MacSwinney on Mines*, p. 230; *Cleopatra Min. Co. v. Dickinson* (Wash. 1902), 68 Pac. Rep. 456; *Core v. N. Y. Pet. Co.* (W. Va. 1903), 43 S. E. Rep. 128.

decree specific performance of a covenant to work, on account of the impracticability of enforcing such a decree,<sup>1</sup> nor will the court generally restrain the working of a mine by injunction, but is always loath to interfere by such proceedings, unless the mode of working was in violation of a negative covenant.<sup>2</sup>

§ 126. **Instroke and outstroke — Right to work by.** — A lessee has by implication the right to work by instroke and can exercise such right without an express stipulation in the lease to that effect,<sup>3</sup> although he cannot work by outstroke without the express consent of the lessor or a covenant in the lease giving him such right.<sup>4</sup> Instroke is the right to raise or take from a leased mine through the shaft of an adjoining mine,<sup>5</sup> and where the mineral is mined on the demised land by means of drifting, the right is of material advantage to the lessee, as saving him the expense consequent upon sinking a new shaft to reach the ore.<sup>6</sup> Outstroke is the right to raise ore from a mine adjoining a demised mine, through a shaft or opening in the leased mine.<sup>7</sup> The right does not exist in the lessee by implication, but must be specially covenanted for before it can

<sup>1</sup> *Wheatley v. West. C. Co.*, *supra*; *Abinger v. Ashton*, 17 Eq. 370; *Fry Spec. Per. of Con.* 18; *Pollard v. Clayton*, 1 K. & J. 462; *Booth v. Pollard*, 4 Y. & C. Ex. Eq. 61.

<sup>2</sup> *Abinger v. Ashton*, *supra*; *MacSwinney on Mines*, p. 280; *High on Injunctions*, Vol. 1, chapt. 5; *McCann v. Wallace* (Oreg. 1902), 117 Fed. Rep. 936.

<sup>3</sup> *Whally v. Ramage*, 10 W. R. 315; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; s. c. 8 Morrison's Min. Rep. 322.

<sup>4</sup> *James v. Cochrane*, 7 Ex. 170; 8 *Id.* 556; *MacSwinney on Mines*, pp. 238-239.

<sup>5</sup> *MacSwinney on Mines*, p. 231.

<sup>6</sup> *Jegon v. Vivian*, *supra*; *Lewis v. Fothergill*, L. R. 5 Ch. 103; *MacSwinney on Mines*, *supra*.

<sup>7</sup> *MacSwinney on Mines*, Sec. 49, p. 231.

be rightfully exercised,<sup>1</sup> for though the lease of a mine carries with it to the lessee the right to use the space or chamber from which the ore is taken,<sup>2</sup> the right extends only to the minerals demised, and would not authorize the lessee to use the same for the conveyance of minerals from any other mine,<sup>3</sup> and such use would entitle the lessor to collect a way-lease rent, by way of compensation, for the exercise of the privilege.<sup>4</sup>

§ 127. **Forfeiture for breach of covenant.** — Conditions in leases working forfeitures are not favored by the courts and such provisions will not be enforced, unless from the language used it was clearly the intention of the parties,<sup>5</sup> and whenever there is any doubt about the lessor's right to enter and declare a forfeiture on the breach of a condition the doubt will be resolved against such right, and the court will hold the provision to be a covenant sounding in damages.<sup>6</sup> Nor will the court assume a particular transaction to work a forfeiture, although in violation of a covenant, in the lease, without first giving the lessee an opportunity of trying the question under the proper issues,<sup>7</sup> and even where the court finds that the lessee has been guilty of such a breach as would work a forfeiture of the lease, the lessor

<sup>1</sup> *James v. Cochrane*, 7 Ex. 170; 8 *Id.* 556; *MacSwinney on Mines* pp. 238-239.

<sup>2</sup> *Lewis v. Brauthwaite*, 2 B. & Ad. 437; *Keyse v. Powell*, 2 E. & B. 144; *Eardley v. Granville*, 3 Ch. D. 826; *Jones v. Cochrane*, *supra*.

<sup>3</sup> *Gould v. Gt. West. Coal Co.*, 2 De G. J. & S. 600; *Rogers v. Taylor*, 1 H. & N. 706.

<sup>4</sup> *MacSwinney on Mines*, p. 239, where the Scotch law is stated to be the same. *Mungle v. Young*, 10 Sess. Cas. (Ser. 3) 901.

<sup>5</sup> *McKnight v. Kreuntz*, 51 Pa. St. 232; *s. c.* 53 *Id.* 319. Causes of forfeiture not specified are not inferred. *Core v. N. Y. Pet. Co.* (W. Va. 1903), 43 S. E. Rep. 128; *Henne v. So. Penn. Oil Co.* (W. Va. 1903), 43 S. E. Rep. 147.

<sup>6</sup> *Ante, idem.* *Core v. N. Y. Pet. Co.*, 43 S. E. Rep. 128.

<sup>7</sup> *Bamser v. Colby*, 1 Hare, 109; *s. c.* Mor. Min. Dig. 185.

will not be permitted to take advantage of such right, unless he himself has performed all the conditions of the forfeiture, for such provisions are construed strictly.<sup>1</sup> The breach of a covenant for which forfeiture is the penalty does not operate as a forfeiture *ipso facto*, but there must generally be some act on the part of the lessor to show his election to take advantage of the clause,<sup>2</sup> and a failure to take some steps to enforce the forfeiture, as where the lessor fails to enter, after breach of condition,<sup>3</sup> would generally constitute an acquiescence in the breach and a waiver of the forfeiture.<sup>4</sup> But where it is clearly the intention of the parties, from the language used, that the breach of a particular covenant was to work a forfeiture of the lessee's rights and there has been a breach of such covenant on the lessee's part, the court would carry out the intention of the parties and enforce the forfeiture,<sup>5</sup> and any acts under the lease on the part of the lessee, after entry of the lessor,<sup>6</sup> or notice to the lessee of his intention to work the forfeiture, would be held to be a trespass by the lessee, for which he could be made to respond in damages.<sup>7</sup>

<sup>1</sup> Von Schmidt v. Huntingdon, 1 Cal. 70; Coleman v. Clemens, 23 Id. 248; Clark v. Hart, 19 Beav. 349; 6 De G. M. & G. 232.

<sup>2</sup> Roberts v. Davey, 4 B. & Ad. 664; Doe v. Banks, 4 B. & Ald. 401; s. c. Mor. Min. Dig., p. 111.

<sup>3</sup> This was necessary at common law. Tiedeman R. P., p. 277, § 276. But ejectment has same effect now. *Ante, idem.* Beedle v. Hilldale Min. Co. (Pa. 1902), 53 Atl. Rep. 764.

<sup>4</sup> 2 Washburn R. P. 17, 18; Tiedeman R. P., *supra*.

<sup>5</sup> Tiley v. Meyers, 32 Penn. 267; Blanchard & Weeks Ld. Cas., 438-437.

<sup>6</sup> The entry of the lessor by going on the premises, without lessee's consent, and conducting mining operations, is a sufficient entry to allow the statute of limitations to run against the tenant. Doe v. Bennett, 9 M. & W. 642; s. c. 7 Id. 225. See also Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80.

<sup>7</sup> Lockwood v. Lunsford, 56 Mo. 68. And this applies also to a licensee holding over after a forfeiture. *Idem.*

§ 128. **Reservation of rent or royalty.** — A reservation is the retention of some right or profit arising from the subject of the demise, and which previously had no separate existence.<sup>1</sup> A reservation of royalty is not essential, and if inserted it need not be in any particular form of words;<sup>2</sup> but an express reservation is necessary when the lessor wishes to retain a right of way or any other right or control over the demised premises.<sup>3</sup> The usual terms employed in a reservation of royalty are, "yielding and paying," "provided the lessee shall pay," or "in consideration of the royalty aforementioned;"<sup>4</sup> but the reservation will be good, although it is in general terms and does not show to whom the reservation is made, for the law will apply it according to the nature of the lessor's interest;<sup>5</sup> although, when it is special, it should be to the person from whom the lessee derives his estate, or to the legal owner.<sup>6</sup>

§ 129. **Same — Dead rent payable unconditionally.** — Every lease should contain some provision securing the payment of a rent or royalty to the lessor. It is sometimes customary for the lessor to reserve a fixed or dead rent,<sup>7</sup> in addition to a royalty on all the mineral raised, so that he can depend upon receiving a certain sum each year, regardless of the productiveness of the mine and a

<sup>1</sup> *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 321; *Whitaker v. Brown*, 46 Pa. St. 197; *Pettee v. Hawes*, 13 Pick. 323; *Greenleaf v. Birth*, 6 Pet. 302; *Dyer v. Sanford*, 9 Met. 395.

<sup>2</sup> *Taylor's Land. & Ten.*, § 154; *Drake v. Munday*, Cro. Car. 207.

<sup>3</sup> And can only be made to grantor out of the land granted. *Tiedeman R. P.*, § 843, p. 684.

<sup>4</sup> *Taylor Land. & Ten.*, § 154; *Coswell v. Districh* (15 Wend. 379), where the words "yielding and paying" are made use of.

<sup>5</sup> *Taylor's Land. & Ten.*, *supra*; citing *Jaques v. Gould*, 4 Cush. 384.

<sup>6</sup> *Ege v. Ege*, 5 Watts. 138; *Taylor*, § 155.

<sup>7</sup> See for definition of Dead Rent, *MacSwinney on Mines*, pp. 214-215. For customary reservation of such rent, in modern oil lease, see *Parish Fork Oil Co. v. Bridgewater Gas Co.* (W. Va. 1902), 42 S. E. Rep. 655.

certain additional sum in case it proves more productive. Royalty is generally a certain *per cent* on all mineral removed, and of course if no mineral is found the lessor receives no royalty.<sup>1</sup> But dead rent is payable unconditionally, regardless of whether mineral is found or not;<sup>2</sup> and where a provision for dead rent is incorporated in a lease the lessee, cannot avoid liability therefor by offering to pay for such mineral as was found;<sup>3</sup> nor would his liability be affected by the fact that the mineral was not worth the working,<sup>4</sup> or was not actually worked.<sup>5</sup> However, if by misrepresentation on the part of the lessor the lessee had been impelled to enter into the agreement and the mineral represented to be in place had been previously cut out, then the payment of the rent could be avoided by the lessee on account of the mistake under which he labored when he contracted the obligation.<sup>6</sup>

<sup>1</sup> MacSwinney on Mines, *supra*. Royalty is said to be a *quasi rent*. Campbell v. Leach, Amb. 740. See also MacS. on Mines, 218. The obligation to pay royalty cannot be implied. Jegan v. Vivian, 6 Ch. 737; Crong v. Adams, 5 B. P. C. 588. But royalty on all ore mined by lessee, cannot be reduced below the fixed *per cent* because quality is inferior. Sharp v. Behr (Pa. 1902), 117 Fed. Rep. 864.

<sup>2</sup> Haywood v. Cope, 25 Beav. 140; Phillipp v. Jones, 9 Sim. 519; Mellers v. Devonshire, 16 Beav. 252; Gowan v. Christle, L. R. 2 S. C. & D. 278.

<sup>3</sup> Phillipp v. Jones, *supra*; MacSwinney on Mines, p. 114.

<sup>4</sup> Strelley v. Pearson, L. R. 15 Ch. D. 113; Haywood v. Cope, *supra*.

<sup>5</sup> Jones v. Reynolds, 7 C. & P. 335; Jegan v. Vivian, *supra*. But if lessee only covenant to work mine so long as profitable, rent could not be recovered when it became unprofitable. Jones v. Shears, 7 C. & P. 446. See as to *average clause* to protect lessee, Bishop v. Goodwin, 14 M. & W. 260.

<sup>6</sup> Ridgeway v. Sneyd, Kay, 627; Green v. Sparrow, 3 Swanst. 408. If the covenant to work is absolute, in the condition the mine or quarry may be in, at date of lease, and a fixed rent is provided for, the lessee cannot defeat the rent because the lease was not profitable. Skilly v. Logan (Pa. 1902), 21 Pa. Sup. Ct. 106. But for recovery, where terms of covenant clearly contemplate that lease shall be profitable, see Cleopatrina Min. Co. v. Dickinson (Wash. 1902), 68 Pac. Rep. 456; Hewitt Iron Min. Co. v. Desson Co. (Mich. 1902), 89 N. W. Rep. 865.



§ 130. **Same — Covenant to mine certain amount.** — It sometimes occurs that the lessor, in addition to the covenant on the part of the lessee to work the mine continuously, requires him to produce a certain amount of ore within fixed intervals, during the continuance of the lease. When such a covenant is inserted in a lease it is independent of a covenant for dead rent or royalty, and a settlement of rent or royalty for the amount of ore actually mined will not release the lessee for the breach of a covenant to produce a certain quantity;<sup>2</sup> and where the lessee covenants, unconditionally, to raise a specified quantity and to pay royalty on such an amount as he covenants to raise,<sup>3</sup> he will be liable for the full amount of rent on breach of the covenant, regardless of whether the mineral existed at the time, and will not be permitted to set up the impossibility of performance as a release from his covenant, even though it were impossible for him to raise the stipulated quantity.<sup>4</sup> But although this is the law, it is nevertheless at times a harsh rule to enforce against the lessee, and where the covenant is not absolute to raise a specified quantity,<sup>5</sup> or where, from the other covenants in the lease, the condition could reasonably be implied that the lessee only intended to raise such quantity, in case it existed at the time,<sup>6</sup> or in case he only covenants to produce such

<sup>1</sup> MacSwinney on Mines, p. 220; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; 6 Mor. Min. Rep. 420.

<sup>2</sup> *Powell v. Burroughs*, 54 Pa. St. 329.

<sup>3</sup> *Marquis of Butte v. Thompson*, 13 M. & W. 487; *s. c.* 14 L. J. Ex. 95; *Clifford v. Watts*, L. R. 5 C. P. 577.

<sup>4</sup> *Butte v. Thompson*, *supra*; *Clifford v. Watts*, *supra*; *Powell v. Burroughs*, 54 Pa. St. 329; *Jervis v. Tomkinson*, 1 H. & M. 195; *MacSwinney on Mines*, p. 220; *Skillen v. Logan*, 21 Pa. Sup. Ct. 106.

<sup>5</sup> *Butte v. Thompson*, 13 M. & W. 487.

<sup>6</sup> *Clifford v. Watts*, L. R. 5 C. P. 577. Royalty on minimum quantity cannot be recovered, when merchantable ore is exhausted. *Diamond Iron Min. Co. v. Buckeye Co.*, 70 Minn. 500; 73 N. W. Rep. 507; *Bannan v. Graeff*, 186 Pa. St. 648; 40 Atl. Rep. 805.

quantity and pay the stipulated rent as it may be possible to find under the demised premises, then, in either event, he will only be liable in case the requisite amount of ore existed at the time.<sup>1</sup> Before he could be released from his covenant, however, even in case of this implied or express condition annexed thereto, he must necessarily show that he has performed the same so far as was in his power to do,<sup>2</sup> and if he has made no effort to find the minerals, or has not made such diligent search as to have found them, in case they existed, he will still be liable on his covenant for the rent on the amount of ore contracted for.<sup>3</sup>

§ 131. **Assignment of lease.** — The assignment of a lease is the transfer of the lessee's interest in the tenancy. It may be effected either by operation of law, or by voluntary conveyance.<sup>4</sup> Every lease for a term of years is capable of being assigned, whether the term is in possession, or *in futuro*,<sup>5</sup> and every lessee, except one holding under a tenancy at will, has the power to assign his interest in

<sup>1</sup> *Fooley v. Addenbrook*, 18 M. & W. 174; *s. c.* Mor. Min. Dig. 106; *MacSwinney on Mines*, 220-221; *Clifford v. Watts*, L. R. 5 C. P. 577.

<sup>2</sup> *Ante, idem*; *Powell v. Burroughs, supra*.

<sup>3</sup> See *Clifford v. Watts*; *Jervis v. Tomkinson*, and *MacSwinney on Mines, supra*. "Where the lessee of a mineral right, required to pay a sum for each ton of phosphate taken from the land, — the same to be determined by the market price of the phosphate, — afterwards adopts a new method, by which the mineral is divided into two classes, selling at different prices, the royalty is to be computed by taking the combined values of the two products which the phosphate produces, though the phosphate has a market value before its separation. Where one class of phosphate so produced is crushed and put in bags, which was not required under the method in use when the lease was executed, the lessor is not required to have a portion of such additional expense deducted from her royalties." *Harlan v. Cent. Phos. Co.* (Tenn. 1901), 62 S. W. Rep. 614.

<sup>4</sup> *Taylor's Land. & Ten.*, §§ 426, 427.

<sup>5</sup> *Idem*, 430, p. 6, Vol. II. But see *Austin v. Huntsville Coal Co.*, 72 Mo. 535.

the tenancy, unless he is prevented from so doing by his lease;<sup>1</sup> but when the lease is required by the statute of frauds to be in writing, the assignment must also be in writing.<sup>2</sup> The assignment, however, need not be in any particular form, and any words will be sufficient that clearly show the intention of the parties.<sup>3</sup> But in order to constitute one an assignee of a lease, he must claim through, or be in of the same estate as the person whom he succeeds,<sup>4</sup> and although the fact of his being in possession of the premises is presumptive evidence of his being an assignee, he will not be entitled to the rights and privileges of an assignee, if he holds under, or by virtue of an elder title.<sup>5</sup>

**§ 132. Same — Rights and liabilities of assignee.**— The lessee's privity of estate is transferred by assignment to his assignee,<sup>6</sup> but his privity of contract is not.<sup>7</sup> He therefore remains liable on his express covenants, but his liability on his implied covenants is transferred to his assignee;<sup>8</sup> he is entitled to indemnity, however, from his

<sup>1</sup> "Even a possibility of a term is assignable in equity for a good consideration." Taylor, § 430.

<sup>2</sup> *Welsh v. Schuler*, 6 Daly, 412.

<sup>3</sup> *Spicer v. Banker*, 45 Mich. 630. No consideration need be expressed. *Hastings v. McKinley*, 1 E. D. Smith, 273. For case where assignment was of personality only and the assignee was not liable on covenant for rent, see *Heller v. Dally* (Ind. App. 1903), 68 N. E. Rep. 490.

<sup>4</sup> *Choworth v. Philipps*, Moore, 876; *Roach v. Wadham*, 6 East, 389; *Taylor's Land. & Ten.*, § 429, p. 6.

<sup>5</sup> *Ante, idem*; *Jeherwood v. Oldknow*, 8 M. & W. 382. See as to rebuttal of presumption arising from possession, *Shee v. Gray*, 15 Ir. C. L. 296; also see *Carver v. Palmer*, 83 Mich. 842. An executed contract for assignment of a mining lease, will supersede an earlier contract between lessor and another, not executed. *Dermott v. Priddy* (Mo. App. 1903), 71 S. W. Rep. 1088.

<sup>6</sup> *Taylor's Land & Ten.*, § 436.

<sup>7</sup> *Ante, idem*.

<sup>8</sup> *Gordon v. George*, 12 Ind. 408.

assignee, in case he should be made to pay for a breach of covenant by his assignee.<sup>1</sup> The assignee is bound by the covenants which run with the land, and is liable to the original lessor, for royalty or rent accruing after assignment, even before he comes into possession of the premises; <sup>2</sup> he takes the assignor's interest in the estate subject to the equities between the original parties, and is liable on the covenants annexed to the estate, while he is in possession; <sup>3</sup> but his liability ceases with his possession and he is not liable on collateral covenants,<sup>4</sup> nor for breaches committed by those who preceded him in the enjoyment of the premises.<sup>5</sup>

§ 133. **Duration of tenancy.**—The duration of a tenancy depends both upon the lease and the acts of the parties after the contract has gone into effect. The date of the commencement of an estate for years must be fixed and certain,<sup>6</sup> and although the tenancy need not commence immediately on the execution of the lease, it must be capable of being made certain by a reference to some event or

<sup>1</sup> See *Rensselder v. Hayes*, 19 N. Y. 68.

<sup>2</sup> *Carter v. Hammett*, 18 Barb. 608; *Mariner v. Crocker*, 18 Wis. 251. But an assignee is not liable on prior agreements of assignor with a third party to take out certain quantity of ore. *Preston v. McCall*, 7 Grat. (Va.) 121. But see *Fisher v. Milliken*, 8 Pa. St. 111; *s. c. Mor. Min. Rep.*, Vol. 8, p. 395.

<sup>3</sup> *Fisher v. Milliken*, *supra*.

<sup>4</sup> *Turner v. Reynolds*, 23 Pa. St. 199; *Preston v. McCall*, *supra*.

<sup>5</sup> Nor would he be entitled to take advantage of a breach occurring on the part of the lessor before he came into possession. *Shelby v. Hearne*, 6 Yerg. 512; *Taylor's Land. & Ten.*, § 445. But an assignee under a mere agreement to take possession, is not liable, even though he enters into possession. *Cox v. Bishop*, 8 DeG. M. & G. 815; *Walters v. Northern C. M. Co.*, 5 DeG. M. & G. 629.

<sup>6</sup> *Patterson v. Hubbard*, 30 Ill. 201. But this is not so in a life tenancy or estate. *Taylor Land. & Ten.*, p. 81, § 70.

some contingency that must happen,<sup>1</sup> and the intermediate time must be filled by some subsisting estate, as a tenancy to commence on the happening of a contingency, and leaving a possible interval unfilled, is not, in law, considered a good estate.<sup>2</sup> The time when the lessee commences to pay his royalty, is, in some cases, the commencement of his tenancy,<sup>3</sup> but the tenancy under a verbal lease commences when the tenant takes possession of the premises.<sup>4</sup> Certainty of continuance is also an essential to a term for years and the estate may be limited either absolutely or contingently upon the happening of some certain event.<sup>5</sup> And when the duration of the tenancy is fixed and certain it will terminate without demand and notice by the lessor,<sup>6</sup> and in the case of a tenancy for years, upon the last moment of the anniversary of the day from which the tenant was to hold, in the last year of his tenancy.<sup>7</sup>

§ 134. **Same — May be perpetual.** — There is no limitation to the extent of a tenancy for years, and mining leases, like other leases for real estate, may be of perpetual duration, and this is the law, both in England and the United States. The manor leases in New York and the fee farm leases in Pennsylvania, are the most common illustrations of this kind of lease,<sup>8</sup> but they will apply as well to mining as to other species of property, and will be equally valid, whether they are in the form of a grant of land in

<sup>1</sup> *Finkelmeier v. Bates*, 10 N. Y. S. C. 483; *Taylor's Land. & Ten.*, § 95.

<sup>2</sup> *Taylor's Land. & Ten.*, § 72, p. 88.

<sup>3</sup> The payment of royalty is *prima facie* evidence of the existence of the tenancy. *Taylor's Land. & Ten.*, § 69.

<sup>4</sup> *Evans v. Winona Land. Co.*, 30 Minn. 515.

<sup>5</sup> *Taylor's Land. & Ten.*, § 75, p. 85, and cases cited.

<sup>6</sup> *Fox v. Nathans*, 32 Conn. 348.

<sup>7</sup> See as to rule of computation of terminal days, *Taylor's Land. & Ten.*, § 78, p. 89.

<sup>8</sup> *Taylor's Land. & Ten.*, § 74, 261-440.

fee, reserving an annual rental,<sup>1</sup> or a conveyance of an ordinary tenancy, based upon a present consideration.<sup>2</sup> The provision is quite frequent in leases of mining property, as a limitation of the tenancy, that the lease shall continue so long as the lessee shall continue to pay the royalty and perform his part of the covenants contained in the lease,<sup>3</sup> but where the lessee covenants also to pay the royalty, and perform the covenants on his part, this is construed to be a perpetual lease.<sup>4</sup> It could be forfeited by the lessor for a failure to perform the covenants, but as long as he complies with the conditions of the lease, the tenancy could only be terminated by the consent of both parties to the lease.<sup>5</sup> A lease to continue as long as the property demised is used for certain purposes, although for a present money consideration, is held to be a lease in perpetuity at the will of the lessee and to convey a base or terminable fee.<sup>6</sup> The fee in lands may also be granted by instruments in which rent or royalty is reserved to be paid, and covenants may be inserted to enforce the performance by the grantee.<sup>7</sup> But such instruments are conveyances, rather than leases, and the only similarity between the two is the reservation of the rent or royalty,

<sup>1</sup> *Ante, idem*; *Saunders v. Hays*, 44 N. Y. 79. For an oil lease, without limitation as to time, which provided for a fixed annual payment in lieu of work or forfeiture, which was held to create a perpetual lease, so long as oil or gas was produced, see *Lowther Oil Co. v. Duffy* (W. Va. 1903), 43 S. E. Rep. 101.

<sup>2</sup> *Watterson v. Reynolds*, 95 Pa. St. 474.

<sup>3</sup> *Wallace v. Hornstead*, 44 Pa. St. 492; *Phil. & Co. v. Beaumont*, 39 Pa. St. 43.

<sup>4</sup> *Ante, idem*.

<sup>5</sup> *Folts v. Huntley*, 7 Wend, 210; cited *Tay. Land. & Ten.*, § 74.

<sup>6</sup> *Taylor's Land. & Ten.*, *supra*; *Delhi School Dist. v. Everett*, 52 Mich. 314. But see *Lemington v. Stevens*, 48 Mich. 38.

<sup>7</sup> *VanRensseler v. Reed*, 26 N. Y. 558; cited *Taylor's Land. & Ten.*, p. 433.

and the covenants to secure the payment thereof by the grantee.<sup>1</sup>

**§ 135. Right to remove fixtures and machinery. —**

As a general rule a lessee has the right, at the termination of the lease, to remove such machinery as he may have placed on the demised premises during the continuance of the tenancy.<sup>2</sup> The same rule applies as in the case of a license and in the absence of a covenant not to remove the machinery at the termination of the lessee's rights, he may enter upon the premises and have the right of ingress and egress and a reasonable time to remove the same,<sup>3</sup> and the fact that the mine would be injured by the removal of the machinery would not affect his right.<sup>4</sup> But where the lessee covenanted not to remove the machinery he will not be permitted to do so, and an injunction would

<sup>1</sup> Taylor's Land & Ten., *supra*.

<sup>2</sup> Rolleston v. New, 4 Kay & J. 640; MacSwinney on Mines, p. 246; s. c. Mor. Min. Dig., p. 201.

<sup>3</sup> Desloge *et al.* v. Pierce, 38 Mo. 588.

<sup>4</sup> Rolleston v. New, *supra*, where the principal reason for the refusal of the injunction to prohibit the removal of the machinery was based upon the fact that the lessor had not given lessee notice of his intention to purchase, or paid the value of the machinery. The following cases recognize the lessee's right to remove fixtures, at end of term: Foley v. Addenbroke, 13 M. & W. 174; Lawton v. Lawton, 3 Atk. 18; Brown v. Elect. Lt. Co., 55 Fed. Rep. 229; Nelson v. Howson, 122 Ala. 578; Cooper v. Johnston, 143 Mass. 108; Lake Sup. Can. Co. v. McCann, 86 Mich. 106; Thomas v. Davis, 76 Mo. 73; Richardson v. Koch, 81 Mo. 264; Cassell v. Crothers, 193 Pa. St. 359; 20 Am. & Eng. Enc. Law. (2 Ed.), 785. The casing and derrick used in an oil well can be removed by lessee during term, or within a reasonable time afterwards. Sheller v. Shivers, 171 Pa. St. 569; 33 Atl. Rep. 95. Although the lease provides that improvements are to remain on expiration of lease, it is held this refers only to improvements in the nature of repairs, and lessees are entitled to remove a hauling system put in by them. Beech Cr. Coal Co. v. Mitchell, 193 Pa. St. 112; 44 Atl. Rep. 245.

lie to compel a performance of the covenant.<sup>1</sup> A covenant to keep the machinery in repair and deliver it up at the termination of the tenancy, is a covenant that the courts will enforce, and as such a covenant runs with the land and is a continuous benefit to the mine, it would pass to the grantee of the reversion and could be enforced at the end of the term.<sup>2</sup> A covenant to permit the lessor, at any time he so desired, to purchase the machinery at its value, or to take any part thereof, would not be enforced, however, on account of being injurious and oppressive, and the court would refuse to grant an injunction to prevent the breach of such a covenant.<sup>3</sup>

<sup>1</sup> *Hamilton v. Dunsford*, 6 Ir. Ch. 412. And see also, where such a covenant was enforced, *Storer v. Hunter*, 3 B. & C. 368; 5 D. & R. 240.

<sup>2</sup> *MacSwinney on Mines*, p. 246; *Easterly v. Sampson*, 1 Cr. & J. 105. And see *Foley v. Addenbrook*, 13 M. & W. 174, and *Beaufort v. Bates*, 3 DeG. F. & J. 381.

<sup>3</sup> *Talbot v. Ford*, 13 Sim. 173; *Rolleston v. New*, *supra*, already explained in note. Machinery which can be removed by lessee without material injury to the freehold, does not become part of the realty. *Hewitt v. Gen. Elect. Co.*, 164 Ill. 420. As to right of lessee of oil well to remove tubing, piping and tools, on expiration of lease, see *Siler v. Globe Co.*, 21 Oh. Cir. Ct. Rep. 284.



## CHAPTER X.

### RIGHTS AND LIABILITIES OF LESSOR.

#### SECTION 136. Scope of present chapter.

137. In general.

138. In regard to lessor's reversionary interest.

139. Same — Lessor's implied right to surface support.

140. Penalty for improper working.

141. Lessor's liability to lessee.

142. Same — For injuries from defects in premises.

143. Risk assumed by lessee.

144. Liability to strangers.

145. Right of re-entry.

146. Continued — When same can be exercised.

§ 136. **Scope of present chapter.** — It is impossible, in the short space devoted to this chapter, to treat of all the rights and liabilities of the respective parties, during the continuance of the tenancy, under the varying covenants which different mining leases may contain, and the author will, therefore, leave such rights and liabilities to be determined by the terms of the particular covenant, to which the parties have subscribed, as controlled by the rules and customs of different mining sections, and after premising that the lessor retains certain rights and assumes certain liabilities, even after parting with the possession, and that the lessee, on the other hand, assumes certain rights and obligations, by entering into possession, will proceed to examine the mutual rights and duties of these respective parties, in a general way, placing parties who execute leases for mining purposes in the same position as other lessors and lessees, but confining observations, as far as practicable, to persons in the former vocation only.

§ 137. **In general.** — After the execution of a lease there are reciprocal rights and responsibilities attaching to  
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the different parties to the premises, and they extend not only to the different parties to the lease, but also to third parties with whom they may come in contact in the relation of lessor and lessee.<sup>1</sup> Before the lessee enters upon the land the right of possession is in the lessor,<sup>2</sup> but after that period the lessee alone is entitled to possession, and may maintain all actions for injuries thereto.<sup>3</sup>

§ 138. In regard to lessor's reversionary interest. — After the lessee enters into possession, the rights of the lessor extend merely to his reversionary interest. The lessee is the proper party to bring actions for injuries to the possession,<sup>4</sup> and while it is not improper, in some cases, to join the lessor in such actions,<sup>5</sup> generally speaking, he is only entitled to maintain actions for injuries to the inheritance, or such injuries as would damage his reversionary interest, after the determination of the lease.<sup>6</sup> The lessee has the right to the exclusive possession of the premises;<sup>7</sup> but although he is entitled to the use of the premises for the purposes for which they were demised, even as against the lessor, he must not only use the premises for these purposes alone, but he must also do no act, that would result in injury to the reversionary interest

<sup>1</sup> Taylor's Land. & Ten., § 172, p. 188.

<sup>2</sup> Taylor's Land & Ten., § 173; citing *Vanduyner v. Heffner*, 45 Ind. 589; where the character of tenant's possession is explained.

<sup>3</sup> *Livingston v. Reynolds*, 2 Hill, 157; *Bradstreet v. Pratt*, 17 Wend. 44. Before an entry the lessee cannot maintain an action for mineral removed. *Austin v. Coal Co.*, 72 Mo. 535.

<sup>4</sup> See *supra*.

<sup>5</sup> *Getz v. Phil. & Red. Ry. Co.*, 105 Pa. St. 547.

<sup>6</sup> *Aycock v. Ry.*, 89 N. C. 321; *Mayor v. Lyon*, 69 Ga. 577; Taylor's Land. & Ten. § 173.

<sup>7</sup> And he may enforce this right by an action of ejectment. Taylor's Land. & Ten., *supra*. But see *Vanduyner v. Heffner*, there cited.

of the lessor.<sup>1</sup> The lessee should not exercise his right to mine and dig the soil, without first considering the probable effect of his operations upon the reversionary interest of his lessor, and if he conducts such mining operations in a manner calculated to cause permanent injury to the inheritance, as where a nuisance is erected on the premises,<sup>2</sup> or the foundation of a house is undermined,<sup>3</sup> the lessor, in such cases, is entitled to maintain an action to protect his reversionary interest.<sup>5</sup> The lessor is also entitled to an injunction to restrain acts calculated to injure his reversionary interest, or to prevent the lessee from appropriating the premises for purposes not agreed upon by the parties;<sup>5</sup> but before he can assert his right the injury must be of such a character as to permanently effect the inheritance, and unless the disturbance is of a continuous nature, the reversioner is not entitled to maintain such an action.<sup>6</sup>

§ 139. Same — Lessor's implied right to surface support — In every demise of minerals, the surface owner or

<sup>1</sup> *Douglas v. Wiggins*, 1 Johns. Ch. 435; *Kane v. Vanderburg*, 1 *Id.* 11. And see as to character of injury necessary to support an action. *Queen's Colliery v. Hallett*, 14 East, 489.

<sup>2</sup> *Kerrens v. Selbert*, 11 Bradw. (Ill.) 319.

<sup>3</sup> *Ferrand v. Marshall*, 21 Barb. 409.

<sup>4</sup> *St. Helena Smelting Co. v. Fipping*, 35 L. J. N. S. Q. B. 66, where the injury consisted in the damage done to trees from noxious vapors from a smeltery.

<sup>5</sup> *Madox v. White*, 4 Md. 72; *Wilton v. Saxton*, 6 Ves. 106. See generally as to the injuries resulting in nuisances and the lessor's right to abate same, *Blanchard & Weeks Ltd. Cas.*, p. 630, *et sub.*, citing *Hay v. Cohoes Co.*, 2 Comst. 159. Possession is not essential to restrain waste and secure an accounting for property removed, in violation of terms of lease. *Peck v. A. & L. T. Co.* (Tenn. 1902), 116 Fed. Rep. 273.

<sup>6</sup> *Lyon v. Woodman*, 3 Leg. Gaz. 81; *West Point Iron Co. v. Regiment*, 45 N. Y. 703. And if an action at law would furnish pecuniary compensation, an injunction would be refused. *Jerome v. Ross*, 7 Johns. Ch. 315; *Waldron v. Marsh*, 5 Cal. 119.

lessor is presumed to have contracted in such a manner as to protect his own right of surface support, and unless from the language used it was clearly his express intention to grant the lessee the right to remove the natural support for the surface, the lessor will be held to have retained this right to himself,<sup>1</sup> however broad the lessee's rights may be under the instrument of demise.<sup>2</sup> In such case the rule "*sic utere tuo ut alienum non laedas*" governs the lessee in the conduct of his operations,<sup>3</sup> and if, in the absence of an express agreement giving him the right, he so uses his privileges as to injure the lessor in the enjoyment of his surface rights, the lessor could either restrain him or recover damages for whatever injury he should sustain.<sup>4</sup> But the right of surface support, like any other right, may be waived, or transferred by the lessor, and if, by the terms of the lease, the lessor has by covenant transferred such right to the lessee and limited the damages to pecuniary compensation, the covenant will be supported by the courts, and the lessee will have the right to remove the support from the surface.<sup>5</sup> And the lessee has a perfect right to remove the minerals from the soil, if by so doing he does not occasion unreasonable injury to the lessor's surface rights, and all the lessor can claim is that no physical injury be done to the surface in its normal state.<sup>6</sup> The lessee is under no obligation to support buildings erected

<sup>1</sup> *Dugdale v. Robertson*, 8 Kay & J. 695.

<sup>2</sup> *Harris v. Ryding*, 5 M. & W. 60; *Rogers v. Taylor*, 27 L. J. N. S., Ex. 173; 2 H. & N. 828.

<sup>3</sup> *Bainb. on Mines*, § 431; *Hunt v. Peake*, 29 L. J. Ch. 787; 1 Am. Law Reg. (N. S.) 591; s. c. B. & W. L. C., pp. 616-622.

<sup>4</sup> *Blanchard & Weeks Ltd. Cas.*, pp. 616-620; *Proud v. Bates*, 34 L. J. Ch. 406; 5 Am. L. R. (N. S.) 171. For excavations under railroads. See Chap. *Mining Easements*.

<sup>5</sup> *Smith v. Darby*, L. R. 7 Q. P. 716. And see *Eadon v. Jeffcock*, 7 L. R. Ex. 379; *Taylor v. Shafto*, 8 B. & S. 228.

<sup>6</sup> *Blanchard & Weeks Ltd. Cas.*, *supra*, and cases cited.

by the lessor subsequent to the acquisition of his right to mine,<sup>1</sup> for having acquired a prior right, he has all the privileges necessary to the enjoyment thereof, and if a nuisance result as a necessary incident from the exercise of the right, the lessor can claim no damages therefor.<sup>2</sup>

§ 140. **Remedy for improper working.**—In the absence of a covenant on the part of the lessee to work the mine in any particular manner, the lessee is generally at liberty to work the mine in the method most advantageous to himself, although it may not be to the satisfaction of the lessor.<sup>3</sup> The lessee is not compelled to work the different seams in connective order, under a general covenant to conduct his operations in “a workmanlike manner,” but may work them as he sees fit, so long as he does so in a proper manner; and unless he is otherwise bound by covenant, he may work as long or as short a time as he desires.<sup>4</sup> He will not be allowed to work, however, in such a manner as to injure the surface rights of the lessor, and if such injury results to the lessor from the manner in which he conducts his operations, an injunction will lie on the part of the lessor to restrain a continuance of such work.<sup>5</sup>

<sup>1</sup> *Hay v. Cohoes*, 2 N. Y. 538; *Jones v. Wagoner*, 10 F. P. Sm. 429; *Walters v. Hamilton*, 75 Mo. App. 237.

<sup>2</sup> *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538; *Blan. & Weeks Ld. Cas.* 619. A covenant by lessee to support rock over coal seam, does not amount to an assurance by lessor that there is such rock. *Beattie v. Coal Co.*, 56 Mo. App. 221. As to extent of surface owner's right to support, see *Railroad v. Brandon*, 81 Mo. App. 1.

<sup>3</sup> *Wright v. Pitt*, L. R. 12 Eq. 408; *Sharp v. Wright*, 28 Beav. 150; *Hanson v. Boothman*, 13 East, 22; *Jones v. Shear*, 7 C. & P. 346; *Hodson v. Maulson*, 18 C. B. (N. S.) 332; *Blan. & Weeks Ld. Cas.*, pp. 440-442.

<sup>4</sup> *Blanchard & Weeks Ld. Cas.*, p. 440, and cases cited.

<sup>5</sup> *Bainb. on Mines*, 431; *Blan. & Weeks Ld. Cas.*, p. 616; *Proud v. Bates*, 34 L. J. Ch. 406; *Smart v. Morton*, 1 Jur. (N. S.) 825. In an action to restrain defendants, who are engaged in removing ores from

And so where the lessee has covenanted to conduct his operations in a specified manner, or to work for a certain time, or continuously, the lessor can work a forfeiture of the lease for a breach of this covenant, or recover damages for the breach, at his election.<sup>1</sup>

§ 141. *Lessor's liability to lessee.*—The lessor must be in position to place the lessee in possession of the premises on the day agreed upon for the commencement of the term.<sup>2</sup> The premises should be in the same condition that they were at the date of the demise,<sup>3</sup> and if the condition of the premises is altered, so as to render the same unfit for the purposes for which they were leased;<sup>4</sup> or if, for any reason, the lessor is unable to place the lessee in possession of the land contracted to be demised,<sup>5</sup> the lessee is under no obligation to accept anything less than that which was agreed upon,<sup>6</sup> and can either refuse to enter into possession of the premises, or sue the lessor for the breach of his covenant and for damages for his failure to place him in possession of the

beneath the surface of plaintiff's ground, the burden is on defendants to show that they are not trespassers, and that they have a right to follow the vein into plaintiff's territory; and in case of doubt an injunction should be granted. *Anaconda Copper Min. Co. v. Heinze* (Mont. 1902), 69 Pac. Rep. 909.

<sup>1</sup> *Davis v. Moss*, 38 Pa. St. 346. And if the lessee only enters and makes a pretense to be conducting his operations, as where he greases an engine and arranges the tools, this would not avail him as a compliance with his covenant, *supra*. *Wheatley v. West Min. C. Co.*, 9 Law Rep. Eq. 538. But see as to lessee's discretion in the absence of a covenant, *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538; also, *Hay v. Cohoes*, 2 N. Y. 159.

<sup>2</sup> *Taylor's Land. v. Ten.*, § 176, p. 200.

<sup>3</sup> *Andrews v. Woodcock*, 14 Iowa, 397; *Tunis v. Grandy*, 22 Gratt. 109.

<sup>4</sup> *Cleves v. Willoby*, 7 Hill, 83.

<sup>5</sup> *Ante, idem.*

<sup>6</sup> *Taylor's Land. & Ten.*, § 177; *Tunis v. Grandy, supra*.

whole.<sup>1</sup> In such an action, on a breach of contract against the lessor, for a failure to deliver possession to the lessee, the latter is entitled to recover, as a measure of damage, for the wrongful withholding of possession by the lessor, the difference between the aggregate amount of rent reserved in the lease, and the value of the use of the premises to the lessee during the continuance of the tenancy,<sup>2</sup> and although he cannot recover for a denial of the use of the premises, for any special purpose, which is unknown to the lessor,<sup>3</sup> if he has the proper allegations in his petition, he can introduce evidence tending to show any particular loss sustained by reason of the lessor's breach.<sup>4</sup> But if the lessee permits a third person to enter into possession, as between the lessor and lessee such possession would be equivalent to that of the lessee.<sup>5</sup> He would afterward be estopped from setting up his claim thereto as against the lessor,<sup>6</sup> and even though the lessor might deny him the possession of all the demised premises, if he entered into possession of any part thereof, he could be held responsible on a *quantum meruit* for the use of the premises in his possession.<sup>7</sup>

§ 142. Same — For injuries from defects in premises. — The lessor's obligation and consequent liability to his lessee, however, after the demise of the premises, is not so great as to third persons, who are injured by reason of the defective condition of the premises. As between the lessor and lessee there is no warranty as to the condition of

<sup>1</sup> Taylor's Land. & Ten., *supra*.

<sup>2</sup> Hughes v. Wood, 50 Mo. 350; Green v. Williams, 45 Ill. 206.

<sup>3</sup> Hughes v. Hood, 50 Mo. 350.

<sup>4</sup> Taylor, § 177; citing Ward v. Smith, 11 Price, 19.

<sup>5</sup> But this would not be the rule if the landlord accepted the new tenant for the former one. Bacon v. Brown, 9 Conn. 388.

<sup>6</sup> *Ante, idem*; Taylor's Land. & Ten., *supra*.

<sup>7</sup> Hay v. Cumberland, 25 Barb. 594.

the premises.<sup>1</sup> The lessee has equal means of information with the lessor, and as he takes upon himself these risks on entering the premises, he cannot claim redress from the lessor for an injury received during his occupancy either to himself, his subtenants, or his employees, unless the injury results from a defect which it was impossible for him to have determined, by the exercise of reasonable care,<sup>2</sup> or unless the lessor misrepresented, or actively concealed the true condition of the premises.<sup>3</sup> But the lessor's liability to the lessee for an injury resulting from a defective condition of the premises, is regulated largely by the customs of the section or district where the injury occurs,<sup>4</sup> and where he is guilty of misrepresentation or concealment, as when he does not fairly state the condition of the drains,<sup>5</sup> the lessee, on the proper showing on his part of diligence to determine the defect which contributed to the injury, would be permitted to recover damages for the injury sustained.<sup>6</sup> And when the lessor retains possession of a part of the premises, and the lessee enters into possession of the balance, the lessor's liability to his lessee is generally determined by the exclusiveness of his possession,<sup>7</sup> and although he cannot be held responsi-

<sup>1</sup> Taylor's Land. & Ten., § 175, p. 197. The lessor does not warrant the quality of the ore on the demised premises. *Warren v. Phil. C. Co.*, 83 Pa. St. 437. But a warranty may and sometimes does arise from comparison of the demised ore with that of other mines. *Pearson v. Marlin*, 38 Wis. 265.

<sup>2</sup> *Bowl v. Hunkin*, 135 Mass. 380.

<sup>3</sup> *Scott v. Simmers*, 54 N. H. 426. Lessor is responsible for injuries arising from the bad repair of leased premises, if they were in that state when let, as it was his duty to make them safe. *Stoetzele v. Swearingen*, 90 Mo. App. 588.

<sup>4</sup> *Schnuer v. Dickson*, 3 Brewst. 276.

<sup>5</sup> *Wilson v. Finch Hatton*, 2 L. R. Exch. 236.

<sup>6</sup> Taylor's Land. & Ten., § 175 *et sub.*

<sup>7</sup> *Looney v. McLean*, 129 Mass. 33. But see *Purcell v. English*, 86 Ind. 34. The lessor could not be held liable for a nuisance, arising



ble where the lessee had access to the portion of the premises retained by the lessor, or where he has implied or actual notice of the defects or the risks that he assumes on entering,<sup>1</sup> yet he is responsible to the lessee, as well as to a third party, for an injury resulting from an overt act of the lessor.<sup>2</sup>

§ 143. **Risk assumed by lessee.** — The lessee of a mining lease not only undergoes the risk of quantity and value of the subject-matter of the demise, but he also assumes the perils arising from a defect in the title of his lessor,<sup>3</sup> and if he accepts a lease without having previously investigated the lessor's title, he is liable, as a reward for his negligence and inactivity in this regard, to behold his outlay of capital and expenditures of time and labor go to the enrichment of someone else, and his valuable discoveries come to naught, so far as he is concerned.<sup>4</sup> The lessee can only assert whatever title his lessor may have had,<sup>5</sup> and it therefore becomes of the utmost importance in mining leases for him to see that this title is a good one before making any outlays, and the same rule applies as to the value and

from the lessees use of the premises. *Eastlock v. Local Bd. Health* (N. J. 1902), 52 Atl. Rep. 999.

<sup>1</sup> Taylor's Land. & Ten., *supra*.

<sup>2</sup> Taylor's Land. & Ten., p. 199; *Elliott v. Prey*, 10 Allen, 378; *Alger v. Kennedy*, 49 N. Y. 109. A tenant, whose term is ended by his landlord's tort, can recover for injury to his business or loss of profits caused thereby, when such losses are proven with reasonable certainty to have been due to the landlord's act. *Murphy v. Century Co.*, 90 Mo. App. 621.

<sup>3</sup> Bainb. on Mines, § 323 *et sub.*, s. c. B. & W. L. C. 416; *Roper v. Coombs*, 6 B. & C. 534; *Stone v. Guillim*, 3 Taunt. 438; *Fildes v. Hooker*, 2 Nebr. 424; *Santer v. Drake*, 5 B. & Ad. 992.

<sup>4</sup> *Blanchard & Weeks Ltd. Cas.*, p. 416. "A lessee who fails to call for his lessors title will have no favor in a court of equity." Bainb. on Mines, *supra*.

<sup>5</sup> *Stranks v. St. Johns*, 36 L. J. C. P. 118; s. c. B. & W. L. C. 416.

quantity of the minerals demised, for the lessor is under no implied warranty that they are of any particular quantity or value,<sup>1</sup> and so long as the subject-matter of the demise was not actually exhausted at the time of the lease, the lessee cannot afterwards complain if he works out the mineral before the expiration of his lease, or if they cease to prove as valuable as he had anticipated.<sup>2</sup> It is for this reason a good precautionary measure for the lessee to insert in the lease a provision releasing him from performance of his covenant at such time as the minerals cannot be profitably worked.<sup>3</sup> But the lessor would not be released from an express warranty of value or quantity,<sup>4</sup> nor would the rule as to the lessee's risk, in the absence of such a warranty, extend to a case where the subject-matter of the demise had ceased to exist before the execution of the lease, for in such case there would be a total failure of consideration on the part of the lessor, and the lessee could be subsequently released from his covenant.<sup>5</sup> Generally, however, if the minerals are in existence at the time of the demise and can be obtained by the proper labor and outlay, it is immaterial how

<sup>1</sup> *Warren v. Phil. C. Co.*, 83 Pa. St. 437. The lessor is not liable for failure of quantity or quality, without a clear covenant therefor. *Carondelet Iron Works v. Moore*, 78 Ill. 65; 2 M. M. R. 625.

<sup>2</sup> *Murdock v. Fullerton*, 5 Mook's Eng. Rep. 118; s. c. B. & W. L. C., p. 430. And a mere statement of quality by the lessor is held to be a matter of opinion, and no warranty that they are of the quality stated. *Carondelet Iron Works v. Moore*, 78 Ill. 65.

<sup>3</sup> *Blanchard & Weeks Ltd. Cas.*, p. 430.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Sholl v. German Coal Co.*, 139 Ill. 31; *Clifford v. Watts*, L. R. 5 C. P. 577; *Gowan v. Christie*, 5 Mook, 114; *Murdock v. Fullerton*, 7 Sess. Ca. 404; s. c. 5 Mook, 414; L. R. 2 Sc. App. 273. But see *Butte v. Thompson*, 13 M. & W. 487; *Ridgway v. Sneyd*, 1 Kay, 627; *Meillers v. Devonshire*, 16 Beav. 252; *Phillipps v. Jones*, 9 Sim. 519; *Skillen v. Logan* (Pa. 1902), 21 Pa. Sup. Ct. 106.

unprofitable they may be, the lessee will be held to a performance of his covenant.<sup>1</sup>

§ 144. **Liability to strangers.** — Generally speaking, as between the lessor and lessee, the liabilities of the lessor cease whenever the lessee enters into possession of the premises.<sup>2</sup> With the exception of the liability resulting from a defective condition of the premises, causing an injury, this is perhaps the invariable rule. In regard to third persons, however, the liabilities of the lessor are not entirely suspended by his transfer of the possession of the premises.<sup>3</sup> The lessor would be liable for an injury resulting to a third party from a defective condition of the demised premises, whether the injury results directly from the dangerous condition of the premises at the time of the demise,<sup>4</sup> or from a nuisance resulting from the lessee's use and occupation of the same.<sup>5</sup> A mine or excavation near a public street has been considered a nuisance for which the lessor is responsible,<sup>6</sup> and he can be made to respond in damages for an injury resulting from such a nuisance, although the lessee has entered

<sup>1</sup> *Gowan v. Christie*, L. R. 2 Sc. App. 273; *Phillipps v. Jones*, *supra*; *Butte v. Thompson*; *Ridgway v. Sneyd*; *Mellers v. Devonshire*; *Fort Scott C. & M. Co. v. Sweeney*, 15 Kansas, 244; *s. c.* *Mor. Min. Dig.* 197; *Skillen v. Logan*, *supra*. But see *Cleopatra Min. Co. v. Dickinson* (68 Pac. Rep. 456), where it was held the particular wording of the lease contemplated the mine should yield a profit.

<sup>2</sup> *Taylor's Land. & Ten.*, § 175, p. 193.

<sup>3</sup> *Larne v. F. H. Co.*, 116 Mass. 67; *Learoyd v. Godfrey*, 138 Mass. 315.

<sup>4</sup> *Nelson v. Liv. Brew. Co.*, 2 L. R. C. P. Div. 311; *Taylor's Land. & Ten.*, p. 194. Lessor is liable for injury from defect in premises, existing at the date of lease. *Stoltzelle v. Swearingen*, 90 Mo. App. 588.

<sup>5</sup> *Congreve v. Smith*, 18 N. Y. 79, where the nuisance consisted in a defective coal chute, dangerous in its nature, to public travel.

<sup>6</sup> *Taylor's L. & T.*, p. 194; *Congreve v. Smith*, *supra*. And see *Hays v. Cohoes Co.*, 2 Comst. 159; *St. Helena Smel. Co. v. Tipping*, 116 Eng. C. L. 1093.

into possession of the premises, and even though the nuisance would never have become active, had it not been for the use and operations of the lessee.<sup>1</sup> But the lessor would not, in all cases, be liable for an injury resulting from such a nuisance. It has been said that in order to hold him responsible the nuisance must be a "*normal one*," or such as would continue, regardless of the care and diligence of the lessee.<sup>2</sup> The lessor could not be held responsible for an injury caused by a broken flap over a coal mine, even if it were broken when the premises were demised, for the reason that he was not aware of the condition of the mine, and the nuisance was not a *normal nuisance*, because there would have been no nuisance at all if the lessee had exercised the proper care.<sup>3</sup> This is the distinction noted by eminent text-writers and sustained by the weight of authority. If the injury result from the neglect of the lessee, he alone is responsible for his acts, and in order to hold the lessor liable for a nuisance it must necessarily arise from the lessee's ordinary use of the premises, and be one that could not have been avoided by the exercise of reasonable care on his part.<sup>4</sup>

§ 145. **Right of re-entry.**—The lessor, even after demise, has a right to use all ways appurtenant to the prem-

<sup>1</sup> *Congreve v. Smith*, 18 N. Y. 79. But the tenant is usually liable for such a nuisance. *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164.

<sup>2</sup> *Taylor's Land. & Ten.*, p. 196, and cases cited. *Allen v. Smith*, 76 Me. 395; *Taylor v. Bailey*, 74 Ill. 178.

<sup>3</sup> *Pretty v. Binckmore*, L. R. 8 C. P. 405; *Gwinnell v. Eames*, L. R. 11 C. P. 658. But see *Buesching v. St. L. Gas L. Co.* (73 Mo. 219), where both lessor and lessee were held liable.

<sup>4</sup> *Taylor's Land. & Ten.*, § 175, p. 196. *Leonard v. Storer*, 115 Mass. 86; *Taylor v. Bailey*, *supra*. Under certain conditions the lessor, himself, can recover from the lessee; and for injuries from blasting rock upon premises and turning foul water from a quarry, the landowner, by

ises, in order to demand his rent or royalty, and for the purpose of removing obstructions, and in the demise of the premises he generally retains the right of re-entry; the privilege of going on the premises to ascertain if there has been waste committed, or other act by the lessee or any other person, to the injury of the inheritance.<sup>1</sup> But where the rent or royalty is payable in a certain *per cent* of the ore or mineral taken from the soil, although by the statutes of many of the States he is given a superior right of purchasing the same,<sup>2</sup> the lessor cannot go upon the land and take the mineral until it has been turned over to him by the lessee, or has been severed and set apart for his use.<sup>3</sup> Nor would he have the right to enter upon the premises for any other purpose, unless the right were reserved to him in the lease, for under a strict construction of the law, any unauthorized entry, after the demise of the premises, would amount to trespass, whether there was a resulting injury or not.<sup>4</sup> The common law governing the acts that would amount to a trespass, and the manner of calculating the damage flowing therefrom, has of course been greatly changed by statutes and the customs of different States and sections;<sup>5</sup> but the principle, as a foundation for the

his conveyance, was not estopped to recover damages. *Wilkins v. Monson Slate Co.* (Me. 1902), 52 Atl. Rep. 755.

<sup>1</sup> *Taylor's Land. & Ten.*, § 174. But this is essentially a reserved right. *Supra.* *Dixon v. Claw*, 24 Wend. 188.

<sup>2</sup> See R. S. Mo. for 1899, and statutes different States.

<sup>3</sup> See *Taylor, supra*, for general right of lessor to re-enter. A right to sue a cotenant in trespass for entry and removal of ore, has been recognized upon the part of a sublessee of another cotenant. *Blewitt v. Coleman*, 40 Pa. St. 45. And see also *McCord v. Oakland I. M. Co.*, 64 Cal. 134; 49 Amer. Rep. 686; 11 M. M. R. 160.

<sup>4</sup> *Taylor's Land. & Ten., supra*; *Parker v. Griswold*, 17 Conn. 288.

<sup>5</sup> *Taylor's Land. & Ten., supra*. "The right of re-entry referred to in Civ. Code, § 791, providing that 'when the right of re-entry is given to a lessor in a lease, such re-entry may be made at any time after the right has accrued, on three days' notice,' is the right given the landlord on

law, is still the same, and while the average jury of to-day would seldom fail to give more than nominal damages for an injury occasioned by merely walking over one's grass, where the entry is not made under a license, express or implied, the unauthorized breach of the inclosure would nevertheless amount to a trespass, for it has the tortious element necessary to establish the action of to-day.

**§ 146. Continued — When same can be exercised.—**

Having the right of possession, the lessor at common law, could use such force as was necessary to enable him to re-enter and take possession of the land, and he could only be held responsible for an undue or excessive force used in taking possession.<sup>1</sup> The statutes of forcible entry and unlawful detainer took away the defense which could otherwise have been set up, to an indictment for excessive force used, where the lessor had a right to the immediate possession of the premises,<sup>2</sup> but even after the enactment of these statutes the lessor had the right civilly, to take forcible possession of the premises, and the lessee, after the termination of his term, could not maintain trespass against his lessor, where there was no excessive force used, simply because the latter entered and ejected the lessee.<sup>3</sup> The authorities upon which the above doctrine is based have been controverted, however, in some of the decisions, and it has been held that a lessor could not enter forcibly to expel a lessee, even though the latter was in possession

some default of the tenant during the term, and not the right which he has when the lease is for a fixed term, which has expired." *Earl Orchard Co. v. Fava* (Cal. 1902), 70 Pac. Rep. 1073.

<sup>1</sup> *Taylor's Land & Ten.* §§ 531, 532. But the entry must be for the purpose of obtaining the possession. *Haley v. Brown*, 14 Conn. 270.

<sup>2</sup> *Taylor, supra*, *Argent v. Durant*, 8 T. R. 403. See Statutes different States.

<sup>3</sup> *Taylor, ante*; *Dustin v. Cowdrey*, 23 Vt. 631; *Turner v. Maycott*, 1 Bing. 158. Under the present statutes the lessor should receive possession in the manner pointed out in the statute. *Fraer v. Washington*, 69 S. W. Rep. 835; *Hill v. Watkins*, 69 S. W. Rep. 837.

without any right, for the reason that such an act was made criminal by the statute, and as it conferred no right of possession on the lessor, he would be liable in trespass for such an entry any time before the lessee's possession was legally determined.<sup>1</sup> But the weight of authority is evidently in favor of the former doctrine, which permits a lessor, under a plea of title, to justify a forcible entry, and having once regained the legal possession of the land, he may treat a lessee holding over as a trespasser, and for any resistance on his part, use such a reasonable amount of force as would be necessary to expel him.<sup>2</sup>

<sup>1</sup> *Gooch v. Hallon*, 30 M. A. 450; *Willis v. Stevens*, 24 *Id.* 494. And it has even been held under the Missouri statute that an action can be maintained by a tenant wrongfully holding over, after the expiration of his term, if the landlord uses force to enter. *Hyde v. Tracher*, 22 M. A. 414; *Knevet v. Meyer*, 24 Mo. 107. But the assignee of landlord cannot maintain the action against the tenant. *Holland v. Reed*, 11 Mo. 605.

<sup>2</sup> *Taylor's Land. & Ten.*, § 531, pp. 128, 129; citing *Harvey v. Bridges*, 14 M. & W. 437; *Davis v. Burrill*, 10 C. B. 825. But see, as to necessity of re-entry, and a compliance with the terms of the lease for a breach of a covenant to pay royalty, resulting in forfeiture. *Blan. & Weeks Ld. Cas.*, p. 438, 439; *Bowser v. Colby*, 1 Hare. Ch. 109; 11 L. J. (N. S.) C. C. 132; also *Stockbridge Iron. Co. v. Cone & c. Works*, 102 Mass. 80. "The lease of a coal mine provided that if the payments of rents, etc., were not made in the manner stipulated, the lessors should have full power to 'dissolve, terminate, and annul' the lease: Held, *obiter*, that on the lessee's default, putting in another tenant by breaking in the door at night was 'not the way' to enforce the forfeiture." *Kreutz v. McKnight*, 53 Pa. St. 319; s. c. 51 Pa. St. 232. M. M. D. 185. "Lessee being out of possession, it was held that he could not recover possession in ejectment without showing performance, or an offer of performance, of his covenants. *Id.*" M. M. D. 185. "A lease which has been forfeited constitutes no objection to an action for injuries by taking ore while such lease was outstanding, brought by the lessor, who before suit has re-entered—but such fact goes to the measure of damages." *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80. M. M. D. 185. "The entry of a lessor upon premises held by tenant at will, without the assent of the tenant, by quarrying and carrying away stone, is an entry sufficient to determine the estate at will, and to allow a statute of limitations to run in favor of the person theretofore occupying as tenant." *Doe v. Bennett*, 9 M. & W. 642; s. c. 7 *Id.* 225. M. M. D. 185.

## CHAPTER XI.

### RIGHTS AND OBLIGATIONS OF LESSEE.

- SECTION** 147. Lessee's interest in leased property.  
148. Cannot mine beyond leased premises.  
149. When lessee's interest attaches.  
150. Rights after entering into possession.  
151. Same — Opened and unopened mines.  
152. Liability to lessor.  
153. Same — For removing barriers.  
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156. Same — Disselsin — Liability for rents and profits.  
157. Liability to third persons.  
158. Same — Crossing boundary — Measure of damage.  
159. Damage to mine.  
160. Liabilities of under lessee.  
161. Liability for injuries from negligence.

§ 147. *Lessee's interest in leased property.* — The lessee's interest is confined to the property conveyed in the lease, and he must use it, for the purposes specified in the lease.<sup>1</sup> Where a certain tract of land is leased, with a provision that the mining operations must be confined to a part of the land so leased, the lease is held to include this part of the territory, the same as any other part, subject only to the provisions against mining it; <sup>2</sup> but in a lease for mining purposes, giving the lessee the right to take whatever ore may be produced from the land at certain points,

<sup>1</sup> *Palmer v. Truby* (Pa.), 26 W. N. C. 514; see also *Guffy v. Deeds*, 9 Pa. Co. Ct. 449.

<sup>2</sup> *Massot v. Moses*, 3 S. C. 168; 16 Am. Rep. 697. Lease for mineral of a certain kind only, is limited to the mineral demised. *Verdolite Co. v. Richards* (Pa. Com. Pl.), 7 N. Co. R. 113. But lease for lead held to include zinc also removed. *Hosford v. Metcalf* (Ia.), 84 N. W. Rep. 1054. And see *Gennett v. Delaware & H. Canal Co.*, 122 N. Y. 505; 26 N. E. 522. But see as to limit of boundaries, *Oskaloosa College v. West. Fuel Co.* (Iowa), 54 N. W. 152.



but not the right of possession for any purpose, within the bounds of the territory described, the lessee has no right of possession for any purpose, in any part of the premises, except the sites mentioned, and could not recover in ejectment any other land except those sites.<sup>1</sup> When a lease, however, is given of an exclusive right to mine a certain range on the lessor's land, the right extends not only to mine the range or seam as far as it had been previously opened and worked, but also to follow it to the limits of the land;<sup>2</sup> but such a privilege would not include the right to work a vein upon another portion of the tract conveyed,<sup>3</sup> and if the lease contains a printed form descriptive of the premises, as "a certain lot or piece of land, situate, etc.," the same would be controlled by a written clause following, confining the mining operations to designated points or "sites" within the territory described.<sup>4</sup>

§ 148. **Cannot mine beyond leased premises.**—The lessee of a certain tract of land for mining purposes, acquires no right by reason of his lease to follow the vein of ore or mineral beyond the boundaries of the tract demised, and if he does pursue the vein beyond the tract, he becomes a trespasser for all ore subsequently removed by him.<sup>5</sup> And the fact that the lessee continues to mine beyond the

<sup>1</sup> *Duffield v. Hue* (Pa.), 129 Pa. 94; 18 Atl. Rep. 566. It has been held that in a lease of a tract for a specified mineral, the lessee is entitled to oil or gas that comes to the surface, without compensation, unless same is stipulated in the lease. *Wood Co. Pet. Co. v. Tr. Co.*, 28 W. Va. 210; *Williamson v. Jones*, 89 W. Va. 231; *Johnstone v. Crompton*, 2 Ch. 190; *Lance v. Lehigh Coal Co.*, 163 Pa. St. 84; 20 Am. & Eng. Enc. Law (2 Ed.), 778.

<sup>2</sup> *Sobey v. Thomas*, 89 Wis. 317. And see *Ralsbeck v. Anthony*, 75 Wis. 300; *Walt's Act. & Def.* (Vol. 4), p. 433.

<sup>3</sup> *Duffield v. Hue*, *supra*; s. c. 47 Phil. Leg. Int. 248; *Sobey v. Thomas*, *supra*.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Lyon v. Miller*, 24 Pa. St. 392; s. c. Mor. Min. Dig., p. 184.

boundaries of the land for a term of several years will not give him an estate in the land so wrongfully mined, but the lessor can, at any time, revoke his right to carry on such operations, even though he had previously received royalty on the ore so mined.<sup>1</sup> Nor could the lessor recover, in an action for the royalty on mineral so extracted, although he was rightfully entitled to the possession of the land from which the ore was mined, for while the lessee could be held as a trespasser for the full value of the ore appropriated, less the expense of raising same,<sup>2</sup> he could not be held for the value of the royalty thereon, for he is under no contractual obligation to pay it.<sup>3</sup> But the lessor would become a co-trespasser with the lessee if he should knowingly receive royalty on ore mined from the land of an adjoining property owner,<sup>4</sup> and particularly if he had contributed to the expense of opening the mine beyond the limits of the tenant's estate, for he would then be considered as actively participating in the trespass and exportation of the minerals.<sup>5</sup>

§ 149. **When lessee's interest attaches.** — The interest and resulting rights and liabilities of the lessee of a life estate, accrues upon the execution and delivery of the lease.<sup>6</sup> But the interest of the lessee in an estate for years dates from the time he enters into possession, whether it is a present demise, or an estate to take effect at some future

<sup>1</sup> *Sheldon v. Davey*, 42 Vt. 634; *Ackerman v. Van Houton*, 4 Holst. N. J. Ch. 476.

<sup>2</sup> *Lyon v. Miller*, 24 Pa. St. 392; *Austin v. Coal Co.*, 72 Mo. 535

<sup>3</sup> *McLance Co. C. Co. v. Long*, 81 Ill. 363; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; *Phillipps v. Homfray*, L. R. 6 Ch. 770; *Llynol Co. v. Brogden*, L. R. 11 Eq. 188.

<sup>4</sup> *Dundas v. Muhlenberg*, 35 Pa. St. 351.

<sup>5</sup> *Dundas v. Muhlenberg*, *supra*.

<sup>6</sup> *Taylor's Land. Ten.*, § 176, p. 200.

time.<sup>1</sup> The lessee is entitled to enter into possession on the day fixed for the commencement of the term,<sup>2</sup> and while he has no right to demand that improvements be placed upon the premises, which did not exist at the time of the demise, he has the right to have the premises in the same condition that they were at the time of the demise, and if they are not so, he can refuse to enter upon the same.<sup>3</sup> Where the possession is withheld, he has his election whether to repudiate the contract entirely, or bring an action for the possession against the party wrongfully detaining the same,<sup>4</sup> and if it is the lessor who refuses to let him enter into possession, he can recover damages from him for the breach of the contract, and the measure of damages would be the value of the lease to him, less the aggregate amount of rent reserved;<sup>5</sup> and the fact that the lessee had failed to perform an agreement to make repairs or improvements on the premises, could not be treated as a condition precedent to the vesting of his estate, which would justify the lessor in refusing to permit him to enter into possession.<sup>6</sup> But the lessee cannot avoid his obligations to enter into possession of the premises demised and pay the stipulated

<sup>1</sup> *Ante, idem.* Before an entry into possession the lessee would not have such an interest as to enable him to maintain trespass for mineral removed. *Austin v. Huntsville Coal & Iron Min. Co.*, 72 Mo. 535. But see, generally, as to the nature and extent of lessee's interest under a lease to mine, the late, well considered case of *Kirk v. Mattier*, by Judge Marshall, 140 Mo. 23.

<sup>2</sup> That the lessee has failed to make certain improvements, is not a condition precedent to the vesting of his estate, unless it was so provided in the contract. *Taylor, supra.*

<sup>3</sup> *Murdock v. Fullerton*, 5 Mook Eng. R. 118.

<sup>4</sup> *Remington v. Casey*, 78 Ill. 317.

<sup>5</sup> *L'Hussier v. Zallee*, 24 Mo. 13.

<sup>6</sup> There is no implied obligation to repair. *Hughes & Dill v. Vanstone*, 24 Mo. App. 637. But see *contra*, where it is so provided. *Wash. Nat. Gas. Co. v. Johnson (Pa.)*, 23 W. N. C. 394; 16 Atl. Rep. 799.

royalty from the date for the commencement of the term, even though the lessor has been guilty of fraudulent representations as to the condition of the premises, unless he rescinds the contract immediately upon the discovery of the fraud;<sup>1</sup> and if he permits a third party to enter into possession of the premises, the possession of such person would be equivalent to that of the lessee, and his liability on his covenants would be just the same as though he had himself entered into possession.<sup>2</sup>

§ 150. **Rights after entering into possession.** — After the lessee enters into possession of the demised premises he has the right to use the premises for the purposes for which the same were leased.<sup>3</sup> He has the right to use whatever easements are appurtenant to the premises, and, subject to the conditions of the lease, he has the same right to enjoy the privileges accompanying his possession that his lessor had enjoyed while in possession of the same.<sup>4</sup> The lessor himself has no right to interfere with the possession of the lessee, and he can maintain an action against any one who disturbs him in the enjoyment of this right, or commits trespass upon the premises after his entry into possession.<sup>5</sup>

<sup>1</sup> Lessee takes upon himself all risk of failure. *Gowan v. Christie*, L. R. 2 S. C. App. 273. As to delay and liability for royalty, see *Sharp v. Wright*, 28 Beav. 150; *Williams v. Summers*, 45 Ind. 532; *Ridgway v. Sneyd*, 1 Kay, 627. And as to rescission for fraud, see *Gifford v. Corville*, 29 Cal. 589.

<sup>2</sup> *Walls v. Atcheson*, 3 Bing. 462; *Morgell v. Paul*, 2 M. & R. 363; *Graham v. Whichelo*, 1 C. & M. 188; *Boston &c. Co. v. Ripley*, 13 Allen, 421.

<sup>3</sup> *Taylor, Land. & Ten.*, § 178, p. 203.

<sup>4</sup> *Hubbard v. Shaw*, 12 Allen, 120; *Walt's Act. & Def.* (Vol. 4), p. 257; *Hisey v. Troutman*, 84 Ind. 115.

<sup>5</sup> *Shadwell v. Hutchison*, 4 C. & P. 333; *Thurston v. Hancock*, 12 Mass. 220; *Crowell v. Ry. Co.*, 61 Miss. 631; *Walt's Act. & Def.* (Vol. 4), p. 276; *Austin v. Coal Co.*, 72 Mo. 535. But a tenant at will cannot maintain such an action. *Faulkner v. Alderson*, Gilm. (Va.) 221; *Hyatt v. Wood*, 4 Johns. 150. Lessee has no right to quit and abandon his

And not only is the lessee entitled to maintain actions for injuries to his possession, but he is given such latitude in regard to protecting the rights incident to the purposes for which the premises were demised, that it has been held, a lessee, who under his lease acquired the right to extract all the mineral from the demised premises, could maintain an action against a railroad company in the name of his lessor, on a covenant made by such company, that upon notice it would change the location of its road, or permit the mineral under its roadbed to be mined.<sup>1</sup> But the lessee is liable for injuries resulting to third persons, where his negligence is the approximate cause of the injury, which resulted from a defective condition of the premises.<sup>2</sup> A familiar illustration of this rule is the old case where the lessee had failed to properly cover the shaft of an old mine, which the plaintiff's horse fell into and was killed.<sup>3</sup> He is also liable to the lessor for any waste committed upon the premises, even though it be occasioned by the wrongful act of a stranger,<sup>4</sup> and he is so far charged with the protection of the property intrusted to his care, that he is responsible for any obstruction placed upon the premises, and can be held liable for an injury produced by a nuisance

term. *Paine v. Griffiths*, 86 Fed. Rep. 452; *Bestwick v. Coal Co.*, 129 Pa. St. 592. The lessee could not recover for mineral mined prior to his entry into possession, as possession is essential at the time of a trespass to support an action therefor.

<sup>1</sup> *Getz v. Phil. and Red. R. R. Co.*, 105 Pa. 547; *Mine Hill Ry. Co. v. Lippincott*, 86 Pa. St. 468; *Taylor's Land. & Ten.*, note to p. 204, § 178.

<sup>2</sup> *Norton v. Wiswall*, 26 Barb. 618; *Lowell v. Spalding*, 4 Cush. 277; *Proctor v. Harris*, 4 C. & P. 337; *Hadley v. Taylor*, 11 Jur. (N. S.) 979; *Rider v. Smith*, 3 Term. 766.

<sup>3</sup> *Sybray v. White*, 11 M. & W. 435. And see also *Fisher v. Thirkell*, 21 Mich. 1; *Leonard v. Stover*, 115 Mass. 86; *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164. But see *Buesching v. St. L. & C. Co.*, 73 Mo. 219.

<sup>4</sup> *California Dry Dock Co. v. Armstrong*, 8 Sawyer, 523; *Taylor's Land. & Ten.*, § 178, p. 204.

on the premises, although the nuisance may have existed before the lessee entered into possession, for where an occupant negligently allows a nuisance to continue, his liability for an injury occasioned by the nuisance would be the same as though he had created it himself.<sup>1</sup>

§ 151. **Same — Opened and unopened mines.** — A tenant for life or years has a perfect right to work such mines or quarries as were opened and worked at the commencement of his tenancy,<sup>2</sup> and as to mines already opened, the tenant is not confined to such minerals as might be necessary for his individual use, but has the right to sell and otherwise dispose of the same, for it is but a part of the profit of the land and a mode of enjoyment to which he is entitled.<sup>3</sup> The lease of a tract of land in which there is an opened mine, carries with it the right to work and operate the same, and an action will not lie on the part of the lessor against the lessee or his assignee for the exercise of this right.<sup>4</sup> In the absence of an express grant of the right to open a new mine, however, the owner or lessor of the land is the only person who would have the right to open a mine,<sup>5</sup> and

<sup>1</sup> *O'Dell v. Solloman*, 5 N. Y. 119; *Rex v. Pedley*, 1 A. & E. 827. But see as to landlord's liability, *Center v. Davis*, 39 Ga. 210.

<sup>2</sup> *Lynne's App.*, 81 Pa. St. 44; *Reed v. Reed*, 16 N. J. Ch. 248; *Viner v. Vaughan*, 2 Beav. 466. And a tenant for years may lease an opened mine. *Campbell v. Leach*, Amb. 740; *Irvine v. Covode*, 24 Pa. St. 162.

<sup>3</sup> *Reed v. Reed*, *supra*; *Blanchard & Weeks Ltd. Cas.* 439; *Freer v. Statenbruer*, 86 Barb. 641; *Irvine v. Covode*, *supra*; *Neel v. Neel*, 19 Pa. St. 323.

<sup>4</sup> *Freer v. Statenbruer*, 86 Barb. 641; B. & W. L. C. 439, 252; *Lynne's App.*, *supra*. "An assignee of a lease from a tenant who has wrongfully opened a new mine, may not work the same." *Saunders's Case*, 5 Coke R. 12. A life tenant cannot make a valid lease to open new mines. *Gerkins v. Ry. Co.*, 100 Ky. 734. But as to lease joined in by remainderman, see *Blakely v. Marshall*, 174 Pa. St. 425.

<sup>5</sup> *Ferrand v. Wilson*, 4 Hare, 344; *Tiley v. Moyers*, 25 Penn. 397; *Shaw v. Wallace*, 1 Dutch. N. J. 453; *French v. Brewer*, 3 Wall., Jr., 346.

the tenant for life or years, would not, by reason of his possession, have the right to open and work mines not opened at the time of his demise;<sup>1</sup> and the opening of a mine without authority of the owner or lessor, would constitute waste on the part of such tenant.<sup>2</sup> But the life tenant's rights in this respect are more extensive in America than under the English common law, and before a tenant could be charged with waste, the evidence must affirmatively show facts sufficient to sustain the charge.<sup>3</sup>

§ 152. **Liability to lessor.** — The lessee is bound not only to regard and preserve the rights of the lessor, concerning his interest in the reversion, but he is also under obligation to protect his right of possession, and should notify the lessor of any attempt made to dispossess him. The possession of the lessee is the possession of the lessor, and he is not allowed to gainsay the latter's title.<sup>4</sup> He is liable to the lessor for any damages the latter may suffer by reason of the lessee's failure or refusal to observe the ordinances of any city or town, within whose corporate limits the premises demised may be located, and this liability exists independently of any responsibility to third parties, who may be injured by reason of the lessee's failure to comply with such ordinances.<sup>5</sup> He is

<sup>1</sup> *Ferrand v. Wilson*, *supra*; *Shaw v. Wallace*, *supra*; *Blanchard & Weeks. Ld. Cas.*, pp. 252-439; *Gerkins v. Ky. Co.*, 100 Ky. 734.

<sup>2</sup> *Irvine v. Covode*, 24 Pa. St. 162. But see as to lease, without impeachment, *Vane v. Bernard*, 1 Salk. 161; 2 *Vernon*, 788; *Mor. Min. Dig.* 400.

<sup>3</sup> *Lynn's App.*, 31 Pa. St. 44; and see *Findlay v. Smith*, 6 Munf. 184.

<sup>4</sup> *Bertram v. Cook*, 32 Mich. 518; *Hughes v. Wott*, 28 Ark. 153; *Bedford v. Kelly*, 61 Pa. St. 491; *Ronaldson v. Tabor*, 43 Ga. 230. But this is not the case where lessee was in possession at time of taking lease. *Peralto v. Guiochio*, 47 Cal. 459; *Wright v. Pitt*, L. R. 12 Eq. 408.

<sup>5</sup> *Taylor's Land. & Ten.*, § 179, p. 207. A lessee cannot bind the lessor as agent. *Wilkins v. Abell*, 26 Colo. 462; 58 *Pac. Rep.* 612; *Reese v. Min. Co.*, 133 Cal. 285. Where plaintiff occupied a mining claim under

also under obligation to maintain the boundaries of the demised premises, and for any failure to do so can be held liable in damages to the lessor, or be made to restore him to the possession of the specific tract of land demised, or another tract of an equal value.<sup>1</sup> And where premises are inclosed by the lessee adjoining the tract which he has leased, at the expiration of his term, if the boundaries of the demised premises are not preserved, the presumption would be that the inclosed tract is a part of that included within the original demise, and this presumption would obtain, whether the tract was adjacent to the premises originally demised or not, and regardless of who owned the tract prior to its inclosure with the demised premises.<sup>2</sup> But such a presumption would not obtain in favor of the lessor, and against a third party;<sup>3</sup> nor could the title to such a tract be presumed to be in the lessor where the lessee had derived his title before the expiration of the term, or where he had been in possession of the tract before his entry upon the demised premises.<sup>4</sup>

a lease, he was estopped to deny the landlord's title on the ground that the only discovery of mineral thereon was at the discovery point of another claim. *Bunker Hill Min. Co. v. Pascoe* (Utah), 66 Pac. Rep. 574.

<sup>1</sup> *Stokes v. Monroe*, 86 Cal. 383; *Willis v. Parkinson*, 1 Swanst. 9; *Turner v. Reynolds*, 28 Pa. 199.

<sup>2</sup> *Taylor's Land. & Ten.*, § 179, p. 206. But see as to admission of parol evidence to establish and explain boundaries, *Lyle v. Richards*, 1 Law. Rep. Eng. & Q. App. Cas. 222; 85 L. J. Ch. 214; *Davis v. Shephard*, L. R. 1 Ch. App. 410; *Turner v. Reynolds*, *supra*.

<sup>3</sup> *Doe v. Massey*, 17 Q. B. 373; *s. c.* *Taylor's Land. & Ten.*, note to § 179, p. 207.

<sup>4</sup> *Dixon v. Bates*, L. R. 1 Ex. Ch. 259; cited, *Taylor's Land. & Ten. supra*. And see as to estoppel of a lessee, or purchaser to question the lessor's boundaries where he enters with an understanding as to the location of boundary lines, even though there was an actual mistake as to the true boundaries, *MacGhee v. Stone*, 9 Cal. 600; *Blanchard & Weeks Ltd. Cas.*, p. 428 and cases cited. "Natural gas lease construed,



§ 153. **Same — For removing barriers.** — The lessor of a mine is *prima facie* entitled to support for the surface, and in the absence of a grant of such right, will be entitled to damages if such support is removed. It follows, therefore, that a lessee who removes pillars or support from the mine will be liable to the lessor, and this, independent of any covenant to leave support,<sup>1</sup> and if the lessee removes pillars from between the demised mine and that of an adjoining property owner, he will be liable for waste and can be made to respond for whatever damage may result.<sup>2</sup> But the lessor should not rely on holding the lessee for such conduct and resulting injury, independent of contract and covenant, but should always incorporate in the lease a negative covenant on the part of the lessee not to remove the pillars or support for the surface,<sup>3</sup> and where the lessee has specially covenanted to leave sufficient for the support of the roof and surface, he will not be permitted before the termination of his tenancy to remove the pillars and allow the roof to cave in.<sup>4</sup> Nor would he be permitted to remove pillars and support to the injury of a lessee of a superjacent vein or strata of mineral, but if necessary to secure support for the overlying seam, he would not be allowed to work the under claim in such a way as to injure the owner of the upper vein of ore.<sup>5</sup>

and held to obligate lessee to pay \$100 annually during continuance of lease, and to supply gas to lessor, where he had failed to drill a well on the land as required." *Simpson v. Pittsburgh Plate Glass Co. (Ind.)*, 62 N. E. Rep. 753.

<sup>1</sup> *MacSwinney on Mines*, p. 236; *Marker v. Kenrick*, 13 C. B. 188.

<sup>2</sup> *Marker v. Kenrick*, *supra*; *Ackerman v. Van Houten*, 4 Holst. N. J. Ch. 476; *Lyon v. Miller*, 24 Pa. St. 392; *MacSwinney on Mines*, p. 237.

<sup>3</sup> *MacSwinney on Mines*, *supra*.

<sup>4</sup> *Mastyn v. Lancaster*, 51 L. J. Ch. 696; *Lewis v. Fothergill*, 5 Ch. 108; *Jegan v. Vivian*, 6 Ch. 758; *Willson v. Waddell*, 2 App. Cas. 100.

<sup>5</sup> *Glasgow v. Hurler Alum Co.*, 3 H. L. Cas. 25; *MacSwinney on Mines*, pp. 230-236.

§ 154. **Same—For drowning mine.**—And it is a very good safeguard for the lessor to provide in the lease that the lessee shall not drown the mine, or work the same in a manner liable to result in the overflowing of the mine.<sup>1</sup> Where the lessee covenants not to do any act to the injury of the mine, he will not be allowed to remove the machinery in violation of a covenant not to remove the same, if it would result in the drowning of the mine, if the lessor on his part has complied with the provisions of the lease.<sup>2</sup> And in the absence of an express covenant not to drown the mine, if the lease contained a provision that the lessee should work in a “proper and workmanlike manner” it would be held a violation of this covenant for the lessee to work in such a manner as to overflow the mine.<sup>3</sup> But as the liability of the lessee in such a case would necessarily be somewhat doubtful, in the absence of an express covenant, it is best to incorporate a negative covenant in the lease against drowning the mine, providing that adjoining mines shall not be drained during the continuance of the tenancy by those in possession of the demised mine.<sup>4</sup>

§ 155. **In regard to cotenants.**—The rights of one cotenant cannot be disregarded by another, and although they hold under entirely different titles, if one cotenant disturbs another in his use of the premises, for the purposes for which the same were leased, he can be made to respond in damages for any injury resulting to his cotenant

<sup>1</sup> MacSwinney on Mines, pp. 237-245.

<sup>2</sup> Rolleston v. New, 4 Kay & J. 640; B. & W. L. C. 433; Williamson v. Baird, 10 Jurist (N. S.) 152; Townsend v. Peasley, 35 Wis. 384.

<sup>3</sup> Lewis v. Fothergill, 5 Ch. 110; Mor. Min. Dig. 416; Jegon v. Vivian, 6 Ch. 756; Hodgkinson v. Crawl, 19 Eq. 594; MacSwinney on Mines, pp. 237-245.

<sup>4</sup> Smith v. Kenrick, 7 C. B. 515; Phillippis v. Homfroy, L. R. 6 Ch. 770; MacSwinney on Mines, *supra*; Jegon v. Vivian, *supra*; Gormley v. Sanford, 52 Ill. 159.

from such wrongful act.<sup>1</sup> Where it is necessary to make repairs or improvements on the premises in order to prevent waste, one cotenant can make such repairs or improvements, without asking the consent of the other cotenants, and each can be held for his proportionate share of the expenses. The duty of cotenants to contribute to such expense, is equivalent to that of joint obligors where one discharges the obligation for the whole,<sup>2</sup> and as it would be inequitable to hold one cotenant for the entire expense of preserving the property, where the obligation extends alike to all, the law will affix the obligation on the several cotenants to contribute their respective shares of the expense.<sup>3</sup> But unless such expense is necessary in order to prevent waste, one cotenant, to be held for his share of such improvements, must expressly, or impliedly, consent to such expense.<sup>4</sup> One cotenant cannot acquire, by purchase, an adverse or superior title, and set it up against his cotenants, unless they refuse to contribute their share of the expense for procuring the paramount title.<sup>5</sup> It is held

<sup>1</sup> North Penn. Coal Co. v. Snowden, 42 Pa. St. 488; Maden v. Veeners, 5 Beav. 508; Clegg v. Clegg, 3 Giff. 322; Clark v. Jones, 49 Cal. 618. And see Taylor's Land. & Ten., § 179, p. 207. A lessee becomes tenant in common. Barnum v. London, 25 Conn. 187; Taylor's Land. & Ten., *supra*.

<sup>2</sup> Taylor's Land. & Ten., § 179. But see *contra*, Allen v. Barkley, 1 Spears (S. Car.), Eq. 264. Taxes paid, or other necessary expenses, can be recovered. Glos v. Clark, 97 Ill. App. 609.

<sup>3</sup> Mallett v. U. S. G. & S. Min. Co., 1 Nev. 188; Chase v. Savage Sil. Min. Co., 2 Nev. 9; B. & W. L. C. 381.

<sup>4</sup> Taylor's Land. & Ten., § 179, p. 208. And see as to expenses for legal services, Allen v. Barkley, *supra*.

<sup>5</sup> Duff v. Wilson, 72 Pa. St. 442; Taylor's L. & T., § 179. And see as to relocation of claim on public land, Strong v. Ryan, 46 Cal. 83; Mor. Min. Dig. 374. "A co-tenant who purchases a conflicting title, or his successor having notice of all the facts, will not be permitted, in the contest over the title, in which the other co-owners claim that the purchase of the conflicting title inures to their benefit, to question the common title of the co-tenants." Cedar Canyon Consol. Min. Co. v. Yarwood (Wash. 1902), 67 Pac. Rep. 749.

to be acquired by one for the benefit of all,<sup>1</sup> and equity would not permit one cotenant to hold such title for his own benefit, and to the exclusion of the others, whether the purchase was made in his own name or by some third party for his benefit.<sup>2</sup> But the different tenants must elect to participate in the benefits of the purchase, and offer to contribute their proportion of the expense, before they can be held to have acquiesced in the purchase, and if they fail to make such election or offer to contribute their share of the expense, they will be deemed to have repudiated the entire transaction and cannot then come in for their share of the benefits accruing from the purchase.<sup>3</sup>

**§ 156. Same — Disseisin — Liability for rents and profits.** — The possession of one cotenant is the possession of all, and to create a title by adverse possession in any one of several cotenants, he must obtain exclusive possession and retain the same until the rights of his cotenants are barred by the statute of limitations.<sup>4</sup> Any act which is inconsistent with the joint ownership of possession of all the cotenants, would be considered a denial of their title;<sup>5</sup>

<sup>1</sup> Tiedeman on R. P., § 252.

<sup>2</sup> *Van Horn v. Fonda*, 5 Johns. Ch. 388; *Taylor's Land. & Ten.*, § 179, p. 208. "Where one of several co-tenants of a mining claim attempts to relocate the same, his act inures to the benefit of his co-tenants." *Yarwood v. Johnson*, 70 Pac. Rep. 128.

<sup>3</sup> *Mandeville v. Solomon*, 89 Cal. 125-133; *Taylor's Land. & Ten.*, *supra*. Co-lessees must contribute to the expenses. *Beck v. O'Connor*, 21 Mont. 109. And a refusal only makes the operating tenant liable for royalty. *Schreiber v. Nat. Co.*, 21 Pa. Co. Ct. 657.

<sup>4</sup> Tiedeman on R. P. 251, p. 166; *Brown v. Hogle*, 30 Ill. 119; *Catlin v. Kidder*, 7 Vt. 12; *Thomas v. Hatch*, 8 Swans. 170; *Newcomb v. Cox*, 66 S. W. Rep. 338. "Where a tenant in common takes possession of a tract of land, in which he has an undivided interest, unless he manifests a contrary intention he is presumed to hold possession as well for his co-tenants as for himself." *Stevens v. Martin*, 68 S. W. Rep. 347.

<sup>5</sup> *Rider v. March*, 46 Pa. St. 380; *Great Falls Co. v. Worster*, 15 N. H. 412; *Miller v. Miller*, 60 Pa. St. 10; Tiedeman R. P., *supra*.

but before such denial could operate to bar the rights of the other tenants, they must have had knowledge of the fact that their title was denied by the other cotenant.<sup>1</sup> A refusal to share in the rents and profits is equivalent to a denial of the rights of the others, and for any resistance of their right to enter into possession, they can have either trespass or ejectment at their election for such ouster;<sup>2</sup> but neither action can be maintained against a cotenant, as long as they both remain in possession, and the acts on the part of the wrongdoer does not amount to an eviction, or an injury to some part of the common property.<sup>3</sup> Where one cotenant, in possession of the land, receives money for mineral taken from the same, the other cotenants are entitled to their portion of the proceeds of such sale.<sup>4</sup> One cotenant, however, is not liable for royalty through his own use and occupation of the land, unless there is an express agreement to

<sup>1</sup> *Forward v. Deltz*, 32 Pa. St. 69; *Meredith v. Andrews*, 7 Ired. L. 5; *Gray v. Givens*, Riley Ch. 41; *Abbercrombie v. Baldwin*, 15 Ala. 768. The possession of one is the possession of all until a denial of their right is brought home to them. *Newcomb v. Cox*, 66 S. W. 338 (Tex. 1902).

<sup>2</sup> *Lawton v. Adams*, 29 Ga. 273; *McGill v. Ash*, 7 Pa. St. 397; *Austin v. Rutland Ry.*, 45 Vt. 215.

<sup>3</sup> *Filbert v. Hoff*, 42 Pa. St. 97; *Jewett v. Whitney*, 43 Me. 242; *Silloy v. Brown*, 12 Allen, 37; *Bennett v. Bullock*, 35 Pa. St. 364.

<sup>4</sup> *Hall v. Fisher*, 20 Barb. (N. Y.) 443; *Huff v. McDonald*, 22 Ga. 181; *Allen v. Barkley*, 1 Spears (S. C.), Eq. 264. *Abbey v. Wheeler* (N. Y. 1901), 170 N. Y. 122; 62 N. E. Rep. 1074. "In an action by a tenant in common of mining lands for an account of the rents and profits received by his co-tenant, testimony as to the advantages which would result from mining and draining the land by machinery is not within the issues." *Gregg v. Roaring Springs Land & Mining Co.*, 70 S. W. Rep. 920 (Mo. App. 1902). "A tenant in common of mining land may sue a co-tenant who has taken possession for an accounting, where such cotenant has worked the mines and sold the deposits, since the action is not one to recover for the use and occupation or for rents and profits, but for a part of the estate itself which the co-tenant has taken and carried away." *Abbey v. Wheeler*, 62 N. E. Rep. 1074; 170 N. Y. 122.

that effect by the cotenants;<sup>1</sup> and if he is permitted to use the premises without any such agreement with his cotenants, he cannot afterward be held to pay them for such use, for he is only exercising his common right of ownership.<sup>2</sup> But where there is someone else in possession of the land, and one cotenant receives rent or royalty from the tenant in possession, he can be held to account to the other tenants for all the royalty received by him, over and above his portion of the same.<sup>3</sup>

§ 157. **Liability to third persons.** — It follows from the consequent liability of third persons to lessor and lessee, for injuries resulting to the demised premises from their wrongful act, that either the lessor or lessee can be held responsible to third persons for injuries resulting from a defective condition of the demised premises, where the injury can be proximately traced to the negligence of either, and under certain circumstances both can be held responsible.<sup>4</sup> Generally speaking, the lessee alone can be held liable for injuries occurring after he has entered into possession, and the lessor's responsibilities are suspended after

<sup>1</sup> *McAdams v. Hawes*, 9 Bush (Ky.), 15. But see *contra*, *Early v. Friend*, 16 Gratt. (Va.) 21.

<sup>2</sup> *Scott v. Guernsey*, 60 Barb. 163; *Kline v. Jacobs*, 68 Pa. St. 57; *Keisel v. Ernest*, 21 Pa. St. 90; *McMahon v. Burchell*, 2 Phil. Eq. 134; *Pico v. Columbet*, 12 Cal. 414. But see *contra*, *Pico v. Columbet supra*; *Tiedeman on R. P.*, § 255, p. 170, and cases cited; *Early v. Friend*, 16 Gratt. (Va.) 21; *Holt v. Robertson*, McNull, 475.

<sup>3</sup> *Barnum v. London*, 25 Conn. 187; *Job v. Patton*, L. R. 20 Eq. 84; *Hall v. Fisher*, 20 Barb. (N. Y.) 443; *Early v. Friend*, 16 Gratt. (Va.) 21; *Coleman's App.* 62 Pa. St. 252; *B. & W. L. C.* 275; *Huff v. McDonald*, 22 Ga. 131; *Pico v. Columbet, supra*; *Gowan v. Shaw*, 40 Me. 56; *Webster v. Calef*, 47 N. H. 289; *Hayden v. Merrell*, 44 Vt. 336; *Izard v. Bodine*, 11 N. J. Eq. 403.

<sup>4</sup> *Rider v. Smith*, 3 Tenn. 765; *Proctor v. Harris*, 4 C. & P. 337; *Norton v. Wiewolf*, 26 Barb. 618; *Congreve v. Smith*, 18 N. Y. 79; *Godley v. Haggerty*, 20 Pa. St. 337; *Irwin v. Wood*, 51 N. Y. 224; *Whalen v. Gloucester*, 4 Hun, 24.

the commencement of the term;<sup>1</sup> but where the premises were in a defective condition at the time of the demise, and the lessee has used the premises for the ordinary purposes for which the same were let, if he could not have avoided the injury by the exercise of reasonable care, the lessor would still be liable, notwithstanding the lease.<sup>2</sup> So the lessor can be held responsible for the subsequent condition of the premises if he should renew the lease, or grant a new lease during the continuance of the nuisance;<sup>3</sup> or if the injury results from his failure to perform any obligation which he had voluntarily assumed.<sup>4</sup> But where the injury resulting from the nuisance could have been avoided by the exercise of reasonable care on the part of the lessee, or where the nuisance arises from a use of the premises not contemplated by the lease, the lessee alone could be held responsible for such injury, for the reason that the injury is produced by his own wrongful act.<sup>5</sup> And if the premises are not radically defective at the time of the lessee's entry, and the lessee is under a legal duty to repair, he alone can be held responsible for an injury resulting from a failure to repair;<sup>6</sup> but before he could be so held, it would be necessary to charge him with such

<sup>1</sup> The lessee is the party presumptively liable. *Samuelson v. Cleveland Iron Mining Company*, 49 Mich. 164. See also *Watson v. Moulton*, 100 Ill. App. 560.

<sup>2</sup> *Godley v. Haggerty*, *supra*; *Cheetham v. Hamon*, 4 Term. 318; *Walt's Act. & Def.* (Vol. IV.), p. 256. See *Murphy v. Century Co.*, 90 Mo. App. 621.

<sup>3</sup> *Rex v. Pedley*, 1 A. & E. 827; *Waggoner v. Germaine*, 3 Denio, 306; *Pichard v. Collins*, 23 Barb. 444.

<sup>4</sup> *O'Brien v. Copwell*, 59 Barb. 497; *Kahn v. Love*, 3 Oregon, 206; *Taylor's Land. & Ten.*, § 175, p. 194 and note.

<sup>5</sup> *Taylor's Land. & Ten.*, *supra*. The lessor's liabilities are, except as above enumerated, suspended, whenever lessee enters into possession. *Payne v. Rogers*, 2 H. Bl. 350; *Leslie v. Pounds*, 4 Taunt. 649; *Cheetham v. Hamon*, *supra*.

<sup>6</sup> *Ante, idem.*

legal duty, and show that he negligently failed to perform the same.

§ 158. **Same — Crossing boundary — Measure of damage.** — The object of the law in giving damage to an innocent third party for an injury to his personal or property rights, is to place him, as near as may be, in the position he occupied before the injury occurred. So if a lessee crosses the boundary line of the demised tract, and works into the mine of an adjoining owner, he can be made to respond in damages to such injured owner, for the mineral removed, and the measure of damage would be the market value of the minerals, at the mouth of the pit or shaft, at the time and place of removal, less a just compensation for raising them to the surface,<sup>2</sup> and this in the absence of any fraud on the part of the lessee, or knowledge on his part that he had actually exceeded the limits of the demised tract.<sup>3</sup> But in computing the actual damage the court would not allow the lessee compensation for getting out the mineral, as this would be permitting him to take advantage of his own wrong, but would confine him strictly to the cost of raising the ore, as the only credit to which he would in such case be entitled.<sup>4</sup> If the lessee knew at the

<sup>1</sup> Taylor's Land. & Ten., *supra*.

<sup>2</sup> Phillips v. Hamfray, L. R. 6 Ch. 770; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278. The court will not give consequential damages. Powell v. Alken, 4 Kay & J. 343. This is the rule as to measure of damages recognized in Missouri. Austin v. Huntsville Coal Co., 72 Mo. 535.

<sup>3</sup> Moyl v. Yoppen, 23 Cal. 306. In re United Min. Co., L. R. 15 Eq. 46; Martin v. Porter, *supra*. Rental value is not a proper measure of damage. U. S. v. Magoon, 3 McLean, 171. But see Allen v. Barkley, 1 Spears (S. C.) Eq. 264.

<sup>4</sup> Livini Co. v. Brogden, L. R. 11 Eq. 188; Hilton v. Woods, L. R. 4 Eq. 482; Phillips v. Hamfray, *supra*. The evidence of the cost of removing the ore should be confined to what was a *reasonable* charge therefor, not what the trespasser may have incurred; for if permitted



time of committing the trespass that he had actually exceeded his boundary, the court would perhaps hold him also to exemplary damages,<sup>1</sup> and on principles of justice, he should also be answerable for all actual damage to the premises as well as all profits received therefrom.

§ 159. *Same—Drainage of mine.*—A lessee has no right to artificially conduct water from an adjoining mine into the demised mine,<sup>2</sup> nor could he, as an active instrument, discharge water from the demised mine upon the property of his neighbor.<sup>4</sup> And if the lessee's mine is on a higher level than that of an adjoining property owner, and he conducts or actively assists in conducting water therefrom, on to the mine of such an owner, he can be made to respond for the damage sustained,<sup>5</sup> and that he had been free from negligence and conducted his operations in a reasonable way would not constitute a defense.<sup>6</sup> And his liability would be the same if he should perforate or remove a barrier between his own and the lower mine which would let the water through and drown the lower mine.<sup>7</sup>

to take such a wide range with the evidence and to deduct so liberally from the market value, the evidence of his losses could readily be so magnified as to fully pay for all ore removed.

<sup>1</sup> *Barton C. Co. v. Cox*, 89 Md. 1; *s. c. Mor. Min. Dig.*, p. 235.

<sup>2</sup> *Huston v. Wickersham*, 2 Watts. & S. 314; *Atwood v. Tricott*, 17 Cal. 37. But see as to a court of equity giving consequential damage, *Powell v. Alken*, 4 Kay & J. 343; *Hilton v. Woods*, L. R. 4 Eq. 432.

<sup>3</sup> *Jegon v. Vivian*, 6 Ch. 758.

<sup>4</sup> *Gould v. Martin*, 19 C. B. (N. S.) 758; *Roberts v. Rose*, L. R. 1 Ex. 89; *Hurdman v. N. E. Ry. Co.*, 3 C. P. D. 173; *MacSwinnery on Mines*, p. 401. See the late case of *Sullivan v. Johnson* (Wash. 1902), 70 Pac. Rep. 246.

<sup>5</sup> *Lomax v. Stott*, 39 L. J. Ch. 894; *Westminster & Co. v. Clayton*, 36 L. J. Ch. 476; *Phillipps v. Hamfray*, 6 Ch. 781.

<sup>6</sup> *Rylands v. Fletcher*, L. R. 3 H. L. Cas. 341; *Westminster & Co. v. Clayton*, *supra*. As to right to use and divert subterranean streams, see *Katz v. Walkinshaw* (Cal. 1902), 70 Pac. Rep. 663.

<sup>7</sup> *Durham v. Hood*, 9 Sess. Cas. 474. See chapter, *Water and Water Courses*.

However, a lessee is entitled to the drainage from an adjoining mine by the natural action of gravitation, and if he does not bring the flow to his own mine by artificial means, or actively assist in its flow, from its natural course, he will be free from liability, even though he may have constructed channels or conduits to confine the water to its natural course.<sup>1</sup>

§ 160. **Liabilities of under lessee.** — There is no privity between an under lessee and the original lessor, and the covenants entered into between the original lessor and lessee, such as would run with the land, to pay rent or repair, will in no way affect the under lessee personally.<sup>2</sup> The original lessor, however, still retains the claim upon the land, and notwithstanding there has been an under lease, he may eject either the original lessee or the sub-lessee, where, by the conditions of the lease, they have forfeited their interest in the land.<sup>3</sup> But it is different with an assignee, for as the assignment transfers the entire interest of the lessee to the assignee, the latter is personally responsible to the lessor upon all the covenants running with the land.<sup>4</sup> The original

<sup>1</sup> *Jegon v. Vivian*, *supra*; *MacSwinney on Mines*, pp. 239-240. If it is sought to deprive the lessee of this right, or to subject him to a water lease rent, a covenant should be incorporated in the lease. *MacSwinney on Mines*, *supra*; *Mexborough v. Bower*, 7 Beav. 127. A lessee will not be permitted to operate oil wells so as to drain the oil on to adjoining premises he has leased. *Klepner v. Lemon*, 176 Pa. St. 502; 85 Atl. Rep. 109.

<sup>2</sup> *Earl of Derby v. Taylor*, 1 East, 502; *Robinson v. Lehman*, 72 Ala. 401.

<sup>3</sup> *Taylor's Land. & Ten.*, § 109, p. 119. A lease to a third party by the lessee, during the period for which he has paid royalty, is void, and he cannot set up such lease as a forfeiture by the lessor. *Friend v. Malory* (W. Va. 1903), 48 S. E. Rep. 114.

<sup>4</sup> *Fisher v. Milliken*, 8 Pa. St. 111; *Preston v. McCall*, 7 Gratt. (Va.) 121; *Cox v. Bishop*, 8 DeG. M. & G. 815; *Walters v. Northern C. M. Co.*, 5 DeG. M. & G. 629. The lessee cannot take advantage of an act of his

lessee can be held responsible by the original lessor for any breach by the under lessee, of the covenants contained in the original lease, and for this reason he should require covenants of indemnity from the under lessee for a faithful performance of the covenants contained in the original lease.<sup>1</sup> The interest of the under lessee cannot be defeated by the original lessee's surrendering his estate to the lessor,<sup>2</sup> and before the expiration of the original term the lessor cannot terminate the estate of the under lessee by giving him notice to quit.<sup>3</sup> But an under lessee, after an entry into possession, is bound by all such covenants as run with the land and for this reason he should inform himself of the covenants contained in the lease,<sup>4</sup> and in order to prevent an eviction by the lessor, for a failure to pay royalty, which he may have paid to the mesne lessee, he should stipulate for a provision to protect him from paying his royalty until the mesne lessee could produce a receipt from the lessor for the amount of royalty due him under the lease.<sup>5</sup>

§ 161. **Liability for injuries from negligence.** — The lessee is under obligation to use the property in his possession in such manner as to prevent injuries to others

amounting to a forfeiture, as the provision is for the lessor only. *Henne v. So. Pa. Oil Co.*, 43 S. E. Rep. 147.

<sup>1</sup> *Penley v. Watts*, 7 M. & W. 601; *Logan v. Hall*, 4 C. B. 598; *Taylor's Land. & Ten.*, § 110.

<sup>2</sup> *Eaton v. Luyster*, 60 N. Y. 252; *Lermen v. Hermen*, 87 Ind. 130.

<sup>3</sup> *Taylor's Land. & Ten.*, § 111, p. 121. A forfeiture is authorized only by a violation of an express covenant. An implied covenant gives damages only. *Core v. N. Y. Pet. Co.* (W. Va. 1908), 43 S. E. Rep. 128.

<sup>4</sup> *Flight v. Barton*, 8 Mylne. & K. 283; *Taylor's Land. & Ten.*, §§ 110-118.

<sup>5</sup> *Taylor's Land. & Ten.*, *supra*. An assignee who holds under the assignment is liable for the royalty on minerals mined. *Coulter v. Gas Co.*, 14 Pa. Sup. Ct. 553.

therefrom.<sup>1</sup> It is his legal duty to keep the premises in repair, and for any injury resulting from his neglect to keep the premises in a safe condition or for his reckless management thereof, he can be made to respond in damages to the injured party.<sup>2</sup> He is responsible for the negligent covering of a mine or excavation near the public highway;<sup>3</sup> can be made to respond for filtering filthy water in or upon the land of his neighbor;<sup>4</sup> and is generally liable for any injury caused by his negligent act, or his servants, which occurs within the general scope of their authority.<sup>5</sup> But the lessee cannot generally be held responsible for injuries resulting to persons, who are not lawfully on the premises, or to those who enter without the permission of the lessee, for the reason that he is under no obligation to keep the premises safe for their coming.<sup>6</sup> His liability in such cases has been stated to be that where his negligence is so gross and willful as to be in utter disregard of the consequences, then the injured party may recover, although he was not lawfully on the premises and could not be said to have exercised reasonable diligence to avoid the injury.<sup>7</sup> This is the general rule stated in such cases, as the doctrine of contributory negligence cannot be set up by the defendant, when his conduct is so grossly negli-

<sup>1</sup> *Rex v. Russell*, 4 East, 427; *Norton v. Miswall*, 26 Barb. 618.

<sup>2</sup> *Grinwell v. Eames*, L. R. 10 C. P. 658; *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Eastlock v. Board of Health* (N. J. 1902), 52 Atl. Rep. 999; *Sturmwoold v. Schreiber* (N. Y. 1902), 74 N. Y. S. 995; *McKinley v. Alliance Co.* (Mo. 1901), 66 S. W. Rep. 158.

<sup>3</sup> *Congreve v. Smith*, 18 N. Y. 79; *Grinwell v. Eames*, *supra*; *Petty v. Bickmore*, 8 Id. 405.

<sup>4</sup> *Gould v. Martin*, 19 C. B. (N. S.) 758.

<sup>5</sup> *Pickard v. Collins*, 28 Barb. 444; *Waggoner v. Germaine*, 3 Denio, 306.

<sup>6</sup> *Taylor's Land. & Ten.*, § 174 *et sub.* *Buswell Per. Inj.*, § 91. But see *Sturmwoold v. Schreiber* (N. Y. 1902), 74 N. Y. S. 995.

<sup>7</sup> *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Belt Ry. Co. v. Mann*, 107 Ind. 89; *Cooley on Torts*, p. 810 *et sub.*

gent as to be characterized as recklessness.<sup>1</sup> The carelessness of the injured party in putting himself in the place of danger will not excuse the defendant from the consequences of his wrongful act, but he is not responsible for the injury inflicted, regardless of the culpableness of the injured party.<sup>2</sup> But except in such an excessive case of negligence, the defendant can always set up contributory negligence on the part of the injured party, and if he was trespassing on the premises at the time of the injury, and there is negligence on his part, contributing to produce the injury, he will be barred of his remedy against the person causing the injury.<sup>3</sup>

<sup>1</sup> Cooley on Torts, *supra*. "Lessors are not liable for the wrongful acts of the lessees of their mines not done by their authority or command." *Little Schuylkill v. Richards*, 57 Pa. St. 142. M. M. D. 203.

<sup>2</sup> *Robinson v. West. Pac. Ry. Co.*, 48 Cal. 409; *Hearn v. So. Pac. & Co.*, 50 *Id.* 383; *Johnson v. Canal & Co.*, 27 La. Ann. 58; *New Haven & Co. v. Vanderbilt*, 16 Conn. 420.

<sup>3</sup> *Tuff v. Worman*, 5 C. B. (N. S.) 578; *Butterfield v. Forrester*, 11 East, 60; Cooley on Torts, p. 812 and cases cited; *Senior v. Ward*, 1 Ex. E. 385. And see, as to liability of lessor for negligence of lessee, *Offerman v. Storr*, 2 Pa. St. 395.

## CHAPTER XII.

### OIL AND GAS LEASES.

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§ 162. Property in oil and gas — Peculiarities of. — So long as mineral oil and gas remain in the natural condition in which such minerals are found, in the earth or rock, they are regarded the same as other mineral in place; form a part of the corpus of the estate of a landowner, and would be included as within the meaning of the term "land."<sup>1</sup> The property rights of a landowner to the

<sup>1</sup> Oil and gas as found in the cavities of the rock are held to be placed  
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mineral oil and gas in place in his land are recognized by the courts to the same extent as the property in the solid minerals in place,<sup>1</sup> and where the title to the oil and gas has not been severed from the title to the land, the landowner would be entitled to the possession of such mineral, as an incident of his ownership, although it would require a penetration of the underlying minerals of another owner, in order to reach the oil or gas.<sup>2</sup> But it is a peculiarity of the owner's title to oil and gas that it is only contingent, until a reduction of the mineral to possession. This dependency of the title upon the possession of the mineral is a necessary consequence from the natural compo-

upon the same foundation as other minerals and to be included within the term "lands." *Wilson v. Hughes*, 48 W. Va. 826; 39 L. R. A. 292; 28 S. E. Rep. 781; *Brown v. Spillman*, 155 U. S. 665.

<sup>1</sup> *Kelly v. Oil Co.*, 57 Ohio St. 317; 39 L. R. A. 765; 49 N. E. Rep. 399. Oil lands are subject to location, as "placer claims," under act Feb. 11, 1897; 29 Stat. at L. 526. See *Mor. Min. Rts.* (10 Ed.), p. 176. "Ever since the passage of the placer mining act, lands valuable for deposits of petroleum were considered as open to location and patent as placer claims and as such records were made followed by entries and patents as a matter of ordinary course. 4 L. D. 60; 284; 16 L. D. 117. And such action of the land office was followed by the courts in dealing with oil located or patented as placer ground without question of its regularity. *Gird v. California Oil Co.*, 60 Fed. 532; *Van Horn v. State*, 40 Pac. 964. After this unbroken procedure of more than twenty years, the land office in 1896 (*Union Oil Co.*, 28 L. D. 222), abruptly held that oil was not a mineral and oil lands therefore not subject to entry. This was immediately followed by an Act of Congress making such lands in terms patentable as placers. The ruling itself which induced the confusion was later reversed by the Secretary of the Interior. 25 L. D. 351. The judicial rulings that oil is a mineral have been uniform. *Thompson v. Noble*, 11 M. R. 137; *Gill v. Weston*, 110 Pa. St. 317 barring the anomalous case of *Dunham v. Kirkpatrick*, 101 Pa. St. 36." The title to all oil and other mineral in the Indian Territory is in the different tribes and leases for oil will not be prevented, when ratified by the Secretary of the Interior, for with such matters the secretary's act is ministerial and beyond the power of the courts. *Cherokee Nation v. Hitchcock*, U. S. Sup. Ct. Dec. 1, 1902.

<sup>2</sup> The landowner's right to the oil or gas in place, can be enjoyed, even though it is necessary to drill through underlying strata of coal, or other

sition of the mineral,<sup>1</sup> for although the owner's title would prevail as against one wrongfully reducing such mineral to his possession upon the land of the owner, the latter could not enforce his title to such mineral until he had reduced it to possession.<sup>2</sup> The title is transferred in the earth with the passing of the fluid or gas from the land of one landowner to another;<sup>3</sup> the one who found and reduced the mineral to possession on his land, acquires the title free from all other claims,<sup>4</sup> and while a part of the realty, while in place like other mineral, after severance from the soil, such oil and gas would then become personal property.<sup>5</sup>

§ 163. A distinct class from other minerals. — The same rules of law apply to oil and gas that pertain to other

mineral, the title to which is in a third party, provided the property rights of such mineral owner are respected. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286; 18 L. R. A. 702; 25 Atl. Rep. 237.

<sup>1</sup> The title to natural gas or oil does not vest in the owner until it comes into his possession, for until actual possession is had of such property, no property rights could be enforced, from the very nature of the property. *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 809. "For an account of the first discovery of oil and of the mode in which obtained before the discovery of the method of getting it by boring wells in connection with the construction of a license or grant of oil rights made before such discovery, see *French v. Brewer*, 8 Wall. Jr. 346." M. M. D. 251.

<sup>2</sup> *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 809.

<sup>3</sup> Although oil and gas belong to the owner of land, when in place, they become the property of another landowner, whenever they pass under or upon his land, and the title of the former owner is gone. *Brown v. Spillman*, 155 U. S. 665.

<sup>4</sup> *Williamson v. Jones*, 43 W. Va. 562.

<sup>5</sup> While in the soil or rock, in place like other mineral, oil and gas are parts of the land, but after reduced to possession on the surface, they become personalty. *Kelly v. Oil Co.*, 57 Ohio St. 317; 39 L. R. A. 765; 49 N. E. Rep. 399; *Williamson v. Jones*, 43 W. Va. 562. Before removal on the surface the rights of property may be lost by percolation or evaporation and the title would rest in the landowner who reduced such oil to his possession. *Ante, idem.*



mineral substances, so far as the natural composition of the minerals will permit such application. Oil and gas are included within the general term "mineral" and a reservation of "the mineral," or "all the minerals" in a given tract of land, would be held to embrace, within the reservation, the mineral oil and gas found within the boundaries of the reserved tract.<sup>1</sup> But oil and gas are not included as within the terms "other valuable minerals," when such terms are preceded by an enumeration or specification of certain solid minerals, different in form and substance from such fluids and gases, for under the rule *ejusdem generis*, the general words, preceded by the particular words, would be held to refer to minerals of the like kind and character only with those mentioned.<sup>2</sup> And, likewise, where the particular minerals mentioned are "oil and gas," followed by the general terms, "and other mineral," the particular minerals specified would limit the general terms to fluids and gases only, and solid minerals would not be held to fall within the meaning of the terms used, for the reason that they belong to a separate and distinct class from mineral oil and gas.<sup>3</sup>

§ 164. **Distinguished from other leases.** — As previously observed, the landowner's title to oil and gas, on

<sup>1</sup> Natural gas and petroleum oil are minerals and fall within a reservation in a deed, of "the minerals" in a given tract of land. *Murray v. Allred*, 100 Tenn. 100; 39 L. R. A. 249; 48 S. W. Rep. 355. "Oil is a mineral, and is included in the Act of 1850, relating to tenants in common, of minerals under the general enumeration of 'other minerals.'" *Thompson v. Noble*, 8 Pgh. 201. M. M. D. 251.

<sup>2</sup> *Detler v. Holland*, 57 Ohio St. 492; 40 L. R. A. 266; 49 N. E. Rep. 690.

<sup>3</sup> Nor will a reservation of "oil and gas and other mineral," justify a reservation of the solid minerals. *Moody v. Alexander*, 145 Pa. St. 571; 23 Atl. Rep. 161. "Oil disclosed in a well sunk by the owner of the land, is his exclusive property; and the case is not analogous to the surface owner's right in running streams of water." *Hall v. Reed*, 15 B. Monroe (Ky.), 479. M. M. D. 251.

account of the peculiar migratory tendency of the mineral, is contingent, until the oil and gas are reduced to his possession, and his title is liable to be defeated, at any time, by the natural flow of the mineral from his land into the land of an adjoining owner. This is true of no other minerals than petroleum oil and gas and this distinction between oil and gas and other solid minerals has led to a consequent difference between leases for oil and gas and those for other minerals. In leases of the solid minerals, as in deeds and other contracts, where the rights of the parties, as to the subject-matter, are co-equal, the courts construe the language used in a way to favor the lessee, grantee or obligee, and follow the interpretation against the lessor, grantor, or obligor.<sup>1</sup> But a different rule of construction applies to leases for oil and gas and on account of the peculiar nature of the mineral and the great tendency of such fluids to escape and the resulting injury to the lessor from drainage by means of adjoining wells, such leases are construed most strongly against the lessee and in favor of the lessor.<sup>2</sup>

**§ 165. How created — Form immaterial — Intention controls.** — In oil and gas leases, as in other leases and conveyances, no particular form is required, nor are any set phrases or specific language essential to create the tenancy, for in all modern contracts, the simple rule that the intention of the parties, as gathered from the four corners of the instrument, should be given effect, is the principal rule of construction adopted by the courts.<sup>3</sup>

<sup>1</sup> *Utter v. Sidman*, 70 S. W. Rep. 702.

<sup>2</sup> *Huggins v. Daly* (W. Va. 1900), 99 Fed. Rep. 606; 48 L. R. A. 320.

<sup>3</sup> *Utter v. Sidman* (Mo. 1902), 70 S. W. Rep. 702. The old landmarks are frequently the safest guide for ascertaining the intent, for sometimes, in attempting to follow naught but a "pole star" of con-

Accordingly, when it is ascertained from the language employed in a given instrument, that the parties intended to grant an exclusive right to take all the oil and gas within a given tract, upon certain conditions, such instrument will, generally, be held to be a valid lease of such tract, for the purposes named.<sup>1</sup> And where the contract lacked certain essential conditions, made necessary by statutory or local constructions, in order to constitute it a valid lease, it would nevertheless be held valid by the courts, as an exclusive grant or license, although lacking such requirements, and thus the intention of the parties would be carried out.<sup>2</sup> If the term provided for is definitely limited in the instrument and the lessee has entered and made improvements or expenditures thereunder, the lessor cannot subsequently treat him as a mere tenant at will, even though there is a surrender clause in the lease,<sup>3</sup> and even before an entry by the lessee, where the contract is based upon a sufficient consideration and no third party's rights would be affected thereby, the lessee would be recognized in a court of equity and could specifically enforce the

struction, the most skillful interpreters of such signs are apt to stray from the narrow path and lose both scales and goddess, by the way-side.

<sup>1</sup> An instrument which "grants, demises and lets," "all the oil and gas under," a given tract "with the exclusive right to drill and operate upon such premises," creates a valid lease of such land and not a mere license to mine thereon. *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 44 N. E. Rep. 193; 34 L. R. A. 62; *Ohio Oil Co. v. Kelly*, 3 Ohio Dec. 186; 9 Cir. Ct. 511.

<sup>2</sup> An oil lease, not witnessed, as required by the Ohio statute, to constitute a legal lease, is nevertheless good as an exclusive license, where recorded, or possession is taken under it, sufficient to put third persons on notice, and where no other rights intervene it is also good as an agreement, in equity, for a lease, which would be enforced. *Alleghany Oil Co. v. Snyder*, 106 Fed Rep. 764.

<sup>3</sup> Notwithstanding a surrender clause in a gas lease, if the term created is for a definite time, the lessor cannot regard the estate created as one at will. *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

contract.<sup>1</sup> But this would not be the case where the only consideration for the lease is the prospective royalty of the oil or gas that may be found; such a contract would not create a fixed tenancy, until an actual entry by the lessee, or payment of the royalty, and before such entry or payment the agreement could be terminated by either party.<sup>2</sup>

§ 166. Lessee's interest in—When it attaches.—It is held in New York that the property of a lessee, in an oil or gas lease, is personal property and does not pass by a conveyance of all the lessee's real estate.<sup>3</sup> This, however, is by virtue of a special statute on the subject,<sup>4</sup> and in the absence of such a statute, since the oil and gas in place is real property, the interest of a lessee in a lease thereof, would also be an interest in real estate.<sup>5</sup> A lessee's right or title to the oil or gas, however, even though his lease grants an exclusive right thereto, would be but a contingent right, until the reduction of such mineral to his possession,<sup>6</sup> for as seen in the case

<sup>1</sup> *Alleghany Oil Co. v. Snyder*, 106 Fed. Rep. 764. See chapter on *Specific Performance*.

<sup>2</sup> An instrument denominated a lease, which provides for a right to enter upon land and prospect for oil and the right to drill wells upon the land and to pay a fixed rental for all wells developed, does not become a fixed tenancy until the carrying out of the covenants or the payment of rental and can be terminated by either party, prior to such period. *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346; 52 N. E. Rep. 782. But see *Reed v. Lewis*, 74 Ind. 488; 89 Amer. Rep. 88; *Indianapolis Nat. Gas Co. v. Kibbey*, 185 Ind. 357; *Columbian Oil Co. v. Blake*, 13 Ind. App. 680.

<sup>3</sup> "Under the N. Y. statute the property in an oil or gas lease would be personalty and would not pass by a conveyance of all the lessee's real estate, or any interest therein." *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584.

<sup>4</sup> *Wagner v. Mallory*, *supra*.

<sup>5</sup> *Thompson v. Noble*, 11 M. M. R. 137; *Gill v. Weston*, 110 Pa. St. 317; *Mor. Min. Rts.* (10 Ed.) 177.

<sup>6</sup> Until the oil has been actually taken from the ground, a lessee under an exclusive lease acquires no property in the mineral oil in the

of the landowner himself, because of the tendency of such mineral to pass from his land onto the premises of an adjoining owner, the property in the mineral could not be enforced until the mineral is first obtained.<sup>1</sup> But the lessee's title would be so far recognized by the courts, even before obtaining possession of the mineral, as to enable him to enforce his rights against a mere trespasser, for, as against a wrong-doer, one holding only a contract for a lease, would be entitled to an injunction, to prevent the extraction of the oil or gas, from the premises.<sup>2</sup>

§ 167. **Character and duration of tenancy.**—The courts of Pennsylvania hold that a lease of land for the purpose of boring for oil or gas, does not operate to grant an interest in the oil and gas, in place, to the lessee, at all, but only a right to enter and bore for such mineral.<sup>3</sup> This, however, would be nothing more than a mere license, on the lessee's part, and if the contract is such a one as to grant a present tenancy, in the absence of statute, there would seem to be no legal reason why such mineral should be discriminated against or the obligations of contracts concerning such mineral not enforced.<sup>4</sup>

land covered by his lease. *Wagner v. Mallory* (1902), 169 N. Y. 501; 26 N. E. Rep. 584; *Duffield v. Hue*, 136 Pa. St. 602; *Huggins v. Daly* (W. Va.), 99 Fed. Rep. 606; 48 L. R. A. 320; *Jones v. Forest Oil Co.*, 30 Pitts. Leg. J. (N. s.) 58; *Steelesmith v. Gartlan*, 45 W. Va. 27; 44 L. R. A. 107; 29 S. E. Rep 978.

<sup>1</sup> See above section: *Property in Oil and Gas*.

<sup>2</sup> A person holding a valid contract for a lease has such a title or right, as against a trespasser, as to prevent, by injunction, the extraction of the oil and gas upon the premises subject to his contract, by a mere wrong-doer. *Trees v. Eclipse Oil Co.* (W. Va.), 34 S. E. Rep. 933. See chapter, *Injunctions for Injuries to Mining Property*.

<sup>3</sup> "A lease of land to bore for oil does not grant the property in the oil, but a right to possession of the land for the purpose of boring for oil." *Barnhardt v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237.

<sup>4</sup> It was formerly held, in Pennsylvania, that oil and gas were not minerals, but this is not the rule now in force in this State. *Dunham v.*

Where the discovery of oil is made a condition precedent to the commencement of the tenancy under the lease, after the expiration of such period, if no oil is found, the lessee, in Pennsylvania, is held to be a mere tenant at will.<sup>1</sup> And in Indiana, where the lease provides for an annual rental and is to continue as long as oil is found in paying quantity, but is otherwise unlimited in time, the tenancy under the statute, would be held one from year to year.<sup>2</sup> If the language of the lease contemplates that the tenancy is not to commence until the happening of a certain contingency, as the boring of a test well, the tenancy would not occur until the happening of the contingency;<sup>3</sup> and where a fixed period is named in the lease and an extension provided for, in case of a continuance of paying oil or gas, the term would commence on the date specified, or the happening of the contingency, and end at the expiration of the fixed period, subject to an extension in the event paying oil or gas continued to be produced.<sup>4</sup> But

Kirkpatrick, 101 Pa. St. 86. Mr. Morrison calls this an "anomalous case." Mor. Min. Rts. (10 Ed.) 177.

<sup>1</sup> After period within which oil must be discovered, an oil lease, in Pennsylvania, becomes tenancy at will. *Cassell v. Crothers*, 198 Pa. St. 359; 44 Atl. Rep. 446.

<sup>2</sup> A provision that an oil lease was to remain in force so long as oil was used at a given place, but providing for an annual rental and a forfeiture for failure to complete a well in a given time, since no time is fixed, it is held an annual renting, under the Indiana statute. *Diamond Plate Glass Co. v. Echelbarger*, 55 N. E. Rep. 233.

<sup>3</sup> *Elk Fork Oil and Gas Co. v. Jennings* (W. Va.), 84 Fed. Rep. 839. A contract for an oil lease, when lessee shall procure a partition, is not operative until the partition is procured. *Emery v. League* (1908), 72 S. W. Rep. 603.

<sup>4</sup> Where the lease provides for a tenancy of ten years, or if oil in paying quantities is found, until it is exhausted, the tenancy does not accrue to the lessee on the completion of a test well. The ten-year period is to run while the oil and gas are being removed and an extension of the lease will result at the end of that period, if the mineral is not then exhausted. *Elk Fork Oil & Gas Co. v. Jennings* (W. Va.), 84 Fed. Rep. 839.

at the expiration of the period for which the lease was to run, or in the event of an abandonment of the term or a forfeiture, for failing to comply with the covenants or conditions annexed to the tenancy, or a surrender of the lease, all the rights of the lessee are at an end.<sup>1</sup>

**§ 168. Lessee's quiet enjoyment — Eviction — What amounts to.** — The lessee of an oil lease has an implied covenant of right of entry and quiet enjoyment and while a second lease will not constitute a breach of this covenant, any interference with the possession or working of the lease, by the lessor, will constitute such a breach.<sup>2</sup> The lessor cannot use either the premises or the mineral to the injury of the lessee and where the lessor attempts to use the gas for domestic purposes, he must limit such use to a quantity that will leave sufficient to enable the lessee to carry out the purposes of the lease, and unless he does so his use of the mineral could be prevented altogether.<sup>3</sup> The lessor could not even use the oil or gas from a portion of the leased premises, surrounding certain buildings located on the surface and reserved in the lease, for since the lease demised to the lessee all the oil and gas under the surface, a mere reservation of a portion of the surface

<sup>1</sup> All rights of the lessee to the oil or gas are terminated either by abandonment, forfeiture or surrender of the lease. *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732.

<sup>2</sup> *Knotts v. McGregor* (W. Va.), 85 S. E. Rep. 899. An interference by the lessor with the lessee's possession under the lease will entitle such lessee to a period of time equal to the delay caused by the lessor, in addition to his term. *Stahl v. Van Aleck* (Ohio), 41 N. E. Rep. 85.

<sup>3</sup> The lessor can neither use the premises nor the mineral to the injury of the lessee and where the lessor attempted to use the gas for domestic purposes, he will be refused the right, unless sufficient quantity remains to carry out the purposes and objects of the lease and the intent of the lessee. *Fanker v. Anderson*, 173 Pa. St. 86; 84 Atl. Rep. 434.

would not affect the validity of the grant.<sup>1</sup> Any use of the premises in a way that interferes with the lessee's possession would be a violation of his rights,<sup>2</sup> and where the lease was not a matter of record, a sale, without a reservation of the lessee's right of entry, under his lease, would be a constructive eviction of the lessee.<sup>3</sup>

§ 169. Implied covenants in — To drill wells — Location of.— Under the rule established by the Ohio courts, an oil or gas lease carries with it an implied covenant, upon the lessee's part, that he will operate enough wells to properly develop the production of the mineral found upon the demised premises, and this implied covenant is capable of enforcement by the lessor, although the lease is wholly silent on the subject.<sup>4</sup> And a somewhat similar rule is applied in Pennsylvania, where it is held that the failure of a lease to provide for the contingency of a test well going dry, is obviated by the implied covenant, which the law would annex to the contract, that the work should be proceeded with, with due diligence.<sup>5</sup>

<sup>1</sup> A reservation of the land surrounding certain farm buildings, on a tract covered by an oil and gas lease, will not justify the lessor in drilling and removing the oil or gas, upon or under such reserved tracts. *Lynch v. Burford*, 201 Pa. St. 52; 50 Atl. Rep. 228.

<sup>2</sup> *Stahl v. Van Aleck* (Ohio), 41 N. E. Rep. 35.

<sup>3</sup> A sale by the lessor of a tract of land subject to an oil and gas lease, not of record, without a reservation of the lessee's right of entry under the lease, is a constructive eviction of such lessee. *Mathews v. People's Nat. Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216.

<sup>4</sup> *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764.

<sup>5</sup> "A lessee is under the implied obligation of putting down enough wells to secure oil to the best advantage of both lessor and lessee, but cannot be compelled to put down more than sufficient wells to obtain oil to compensate for the expenditure." *Adams v. Stage*, 18 Pa. Sup. Ct. 308. And in Pennsylvania a lease not providing for the contingency of a test well going dry, is held to carry an implied covenant to "proceed with the exploration, according to the usual course of the business." *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555. But it is



But the implied covenant to put down sufficient wells to drain the lessor's premises, demised under the lease, would not be carried to the extent of requiring the lessee to put down wells on any particular portion of the demised premises, for he would be the sole judge of the locality that would be most profitable for him to sink wells upon, and his judgment, in the absence of fraud or bad faith, on his part, would be conclusive upon the lessor.<sup>1</sup> This would not be true, however, where the lessor reserved the right in the lease to locate the wells, for in such case he would have the exclusive right to say where they should be drilled; but the lessee could not be held in default in drilling such wells until after the location was first selected by the lessor.<sup>2</sup>

**§ 170. Same—Remedy for breach of.**—Where the lease specifies the breaches of the covenants that will authorize a forfeiture, the lease cannot be forfeited for a violation of the implied covenant to bore enough wells to drain the land, but the lessor would be confined to an action for damages for the breach of such implied covenant.<sup>3</sup> On the con-

held in Pennsylvania, that there is no implied covenant to put down additional wells, where paying gas is discovered in the test well, for the effect of the new wells might be to reduce the pressure and prevent the gas from raising in the pipes, which would practically ruin the lessee's property in the gas. *McKnight v. Manfr's Nat. Gas Co.*, 146 Pa. St. 185; 23 Atl. Rep. 164.

<sup>1</sup> *Young v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121; *Colgan v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 119.

<sup>2</sup> Where the lessor reserves the right to locate the wells, the lessee could not be said to be in default until such location of the lessor. *McKnight v. Gas Co.*, 146 Pa. St. 185; 23 Atl. Rep. 164.

<sup>3</sup> *Harris v. Ohio Oil Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 48; *Knight v. Manfr's Nat. Gas Co.*, 146 Pa. St. 185. "Where an oil lease required certain wells to be completed within stated times, and provided that if no well was completed within 30 days the grant should be void unless certain payments were made

trary, if the covenant for additional wells is expressed in the lease, a breach of such covenant may afford the lessor an action for damages, or the right of forfeiture, according to the language of the instrument.<sup>1</sup> The measure of damages which the lessor would be entitled to recover for the violation of a covenant to drill sufficient wells to properly test the land for oil, would, ordinarily, be the rent or royalty, which would have resulted to such lessor, had the lessee complied with such covenant,<sup>2</sup> and upon this question expert evidence would be competent as to the probable amount of, or whether any recovery should be allowed.<sup>3</sup>

**§ 171. Covenants amounting to conditions — Test wells.**— For the protection of the interest of the lessor,

each and every month, it did not constitute a promise to pay rental, and, on breach of the agreement to complete the wells, no action would lie for recovery thereof." *Van Etten v. Kelly*, 64 N. E. Rep. 560 (Ohio, 1902).

<sup>1</sup> A provision in an oil lease that the lease is to be void, unless a well is completed in a given time, or that unless it is so completed the lessee is to pay a given sum for every three months of delay to so complete the well, does not render the lessee liable for the sum named, on failure to complete the well, for the only remedy of the lessor is a forfeiture of the lease. *Snodgrass v. So. Penn. Oil Co.* (W. Va. 1900), 35 S. E. Rep. 820. But where one of the conditions of a contract of sale of oil land and a part of the consideration for such sale, is the agreement of the purchaser to complete an oil well in a given time and other wells, if oil is found, a breach of the condition of the contract of sale will afford the seller a cause of action for the damages resulting therefrom, and he is not confined to a forfeiture of the purchaser's right to bore for oil. *Ammons v. South Penn. Oil Co.*, 35 S. E. Rep. 1004.

<sup>2</sup> The breach of a contract in a gas lease, to test the land for oil, before abandonment of the lease, will entitle the lessor to recover, as damages, the amount of royalties that would have resulted from a compliance with the lease. *McClay v. West Pa. Gas. Co.*, 201 Pa. St. 197; 50 Atl Rep. 978.

<sup>3</sup> And on the construction of a clause in an oil and gas lease, providing for royalty on merchantable gas, expert evidence is competent as to the effect of the flow of gas upon the production of oil, as affecting

there are certain express covenants in oil and gas leases that are construed by the courts as conditions, essential to the enjoyment of the estate by the lessee and for a breach of which, such estate is held to terminate. A condition as to the boring of a test well applies as well to the place where it is to be located — in case the place is provided for — as to the time within which such well is to be completed,<sup>1</sup> and if the lease mentions the property on which the well is to be put down, a failure to drill such well at the place provided for is held to avoid the lease<sup>2</sup> the same as though the well had not been completed within the time stipulated in the lease.<sup>3</sup> But where either the time or place is to be specified by the lessor, until he has indicated his election in this regard, the lessee could not be held to be in default.<sup>4</sup>

**§ 172. Alternative provisions — Working or payment of fixed sum.** — It is not infrequent in the oil and gas sections for the lease to contain alternative covenants or provisions, looking either to the boring of the wells provided for within a given time, or the payment of a fixed amount for an extension of the period to comply with such a cove-

the lessor's right to the royalty stipulated for. *Shewalter v. Hamilton Oil Co.* (Ind. 1902), 62 N. E. Rep. 708.

<sup>1</sup> The condition applies as well to the land *where* the well is to be drilled, as to the time *when* it is to be done. *Cleminger v. Glass Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

<sup>2</sup> Where the lease provided the exact property on which a test oil well should be drilled, a failure to drill it on the property provided for will avoid the lease. *Carnegie Nat. Gas Co. v. Phila. Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

<sup>3</sup> A clause that lessee is to commence and complete a well on the property in a given time, amounts to a condition precedent to the vesting of any estate in the lessee, and a failure to do so will constitute a forfeiture of his rights, which can be enforced by the lessor. *Huggins v. Daly* (W. Va.), 99 Fed. Rep. 606; 48 L. R. A. 320.

<sup>4</sup> *McKnight v. Gas Co.*, 146 Pa. St. 185; 23 Atl. Rep. 164.

nant or condition, in default of both of which a forfeiture is provided for.<sup>1</sup> Where it is simply left to the lessee's option to complete a well within the time specified, or pay a given sum, no right of forfeiture would result to the lessor on a failure to pay such sum, as forfeitures are never implied, but can only result when expressly provided for.<sup>2</sup> If the tenancy is dependent upon a per cent of the mineral oil produced, and a cash rental for the land during the period that gas is extracted, the lessee could either pay the royalty, or the fixed rental, according to the mineral taken and the lessor could not compel him to use the one to the exclusion of the other.<sup>3</sup> And where the privilege is accorded the lessee in the lease to pay annually a stipulated amount per acre upon the land covered by the lease, or drill the land for oil, the lease could be extended by making the annual payment, although the lessee failed to drill the required number of wells.<sup>4</sup>

**§ 173. Same — Lessee must make election before end of term.** — The lessee must make his election as to which of the alternative provisions he will comply with and per-

<sup>1</sup> *Marshall v. Forest Oil Co.*, 198 Pa. St. 88; 47 Atl. Rep. 927.

<sup>2</sup> An alternative provision that if an oil well is not completed as stipulated for, the lessee shall pay a fixed rental, does not authorize a forfeiture for non-payment of such rental, as forfeitures are never implied, but must always be provided for. *Marshall v. Forest Oil Co.*, 198 Pa. St. 88; 47 Atl. Rep. 927.

<sup>3</sup> An oil and gas lease predicated upon a royalty on the oil and a cash rental for the land while gas is produced, is kept in effect by a payment of either the royalty on the oil or the cash rental while gas is produced. *Harness v. Eastern Oil Co.* (W. Va. 1901), 38 S. E. Rep. 662.

<sup>4</sup> A lease which provides for an extension from year to year, by the payment of a fixed sum per acre, can be held in effect, notwithstanding a failure to drill the required number of wells, where such a clause is inserted in the lease. *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; *Consumers Co. v. American Land Co.*, 31 Pitts. Leg. J. 24.

form the same before the expiration of his tenancy, because if he waits until the lease has expired by lapse of time he cannot then prolong it by tendering the amount he otherwise could have paid, as an excuse for the performance of the alternative condition, during the continuance of the tenancy.<sup>1</sup> The privilege of paying a certain amount in lieu of the completion of a certain number of wells, within a given period, cannot be exercised by the lessee after the end of the term, so as to prolong the tenancy,<sup>2</sup> and notwithstanding the lease is conditioned for an indefinite extension, so long as paying oil or gas may be produced, in the absence of such production, since this alone is the contingency upon which an extension is to depend, the lease would not be extended by a tender of certain payments, conditioned to be made in lieu of the completion of the test well provided for, as this payment was intended to have been made only during the continuance of the term, as a penalty for the failure to complete the test well.<sup>3</sup>

**§ 174. Same — Unlimited option in lessee avoids lease.** — In West Virginia an oil and gas lease is held void which recognizes upon the lessee's part an indefinite and

<sup>1</sup> On expiration of the term for which the lease is fixed, the option to pay a given sum to extend the lease, which was an alternative condition of a failure to drill a test well during the term, cannot be exercised so as to prolong the tenancy. *West Pa. Gas Co. v. George*, 161 Pa. St. 47; 28 Atl. Rep. 1004.

<sup>2</sup> A privilege by the lessee of an oil lease to pay a stipulated sum per acre, on failure to drill a fixed number of wells in a given time, cannot be exercised after the termination of the tenancy for which the lease was granted. *Brown v. Fowler*, 65 Ohio St. 607; 68 N. E. Rep. 76.

<sup>3</sup> A lease for a given time and as much longer as paying oil or gas is found, will not be extended by payments made after the expiration of the term, unless paying oil or gas is found, simply because such payments were provided for the delay of the test well at the commencement of the term. *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271.

unlimited option of either working the ground or not, at his election, unless such lease is based upon a fixed and certain rental, in addition to the prospective royalties, in case of discovery of oil or gas.<sup>1</sup> Nor is such a holding any departure from settled legal principles, for while the interest of the lessor would be subserved by a diligent operation of his land, under an oil or gas lease, where the lease does not obligate the lessee to work the land or pay any certain sum for the non-performance of his contract, and he does neither, there is certainly nothing of benefit moving to the lessor in return for his demise, and the contract would be void for want of a consideration.<sup>2</sup> And a clause that until the completion of a test well, a fixed sum shall be paid, at stated intervals, without any limit, as to time, is tantamount to an indefinite option to pay such sum or complete the well at the election of the lessee, and since he is not bound, under such a provision, to ever produce oil or pay the royalty provided for in the lease, the courts of Indiana hold that such a lease would be void.<sup>3</sup>

§ 175. **Additional wells — Covenants for.** — Where the covenant is expressed in the lease that the lessee, within a specified time, is to drill a given number of additional wells, in case the test well develops oil or gas, a violation of such a covenant would authorize a forfeiture of the lease, or the recovery of damages, according to the terms

<sup>1</sup> A lease, which does not bind the lessee to search diligently for oil or gas, is void, unless rent is provided for, in addition to the prospective royalty to be received, in case of discoveries. *Steelsmith v. Gartlan*, 45 W. Va. 27; 44 L. R. A. 107; 29 S. E. Rep. 978; *Cowan v. Iron Co.*, 83 Va. 547; *Petroleum Co. v. Coal Co.*, 89 Tenn. 381. See also *Fed. Oil Co. v. West. Oil Co.* (Ind. 1902), 112 Fed. Rep. 373; *Brown v. Fowler* (Ohio 1902), 63 N. E. Rep. 76.

<sup>2</sup> *Ante, idem.* But see *Lowther Oil Co. v. Guffy* (W. Va. 1903), 43 S. E. Rep. 101.

<sup>3</sup> *Brooks v. Kunkle* (Ind.), 57 N. E. Rep. 260.

of the lease.<sup>1</sup> But a covenant for the completion of additional wells, within a given time after completion of the test well, would be of no effect unless there was some time limit within which the first well provided for should be commenced or completed,<sup>2</sup> and even where the covenant is definite as to the time and place and number of wells that shall be bored, after the completion of the test well, it is held, in Ohio, that such a covenant for additional wells cannot be enforced, where the test well has demonstrated the utter uselessness of drilling such wells, because of the entire absence of such mineral upon the demised premises.<sup>3</sup>

**§ 176. Rent and royalty — Peculiar covenants for. —**  
In many leases for oil and gas the covenants for royalty, like many other provisions of such leases, are the same as the customary clauses pertaining to the same subject, in leases of the solid minerals,<sup>4</sup> but it frequently occurs in such leases that covenants as to royalty are employed that are peculiar to leases of oil and gas, and some of these have recently been construed by the courts. One of the most customary covenants for royalty that is peculiar to leases

<sup>1</sup> *Huggins v. Daly* (W. Va.), 99 Fed. Rep. 606; 48 L. R. A. 320; *Carnegie Gas Co. v. Phila. Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *McClay v. Western Pa. Gas Co.*, 201 Pa. St. 197; 50 Atl. Rep. 978; *Snodgrass v. So. Pa. Oil Co.*, 35 S. E. Rep. 820; *Marshall v. Forest Oil Co.*, 198 Pa. St. 83; 47 Atl. Rep. 927.

<sup>2</sup> An agreement in an oil lease to finish a second well in a specified time, after completion of the first well, is of no effect where there is no agreement that the first well shall be commenced or completed in a given time. *Federal Oil Co. v. West. Oil Co.* (1902), 112 Fed. Rep. 373.

<sup>3</sup> Notwithstanding a clause in an oil lease, providing for a second well within a stated period, the lessee cannot be compelled to drill such well, where the first well has demonstrated that no oil or gas can be discovered on the premises. *Kenton Gas Co. v. Orwick*, 21 Ohio Cir. Ct. Rep. 274.

<sup>4</sup> See chapter, *Mining Leases*.

for oil and gas, is the provision permitting the lessee to pay a given sum, at fixed intervals, in lieu of the completion of a test well or wells. Where this clause occurs the lessor can recover the rent, on failure to complete the well or wells, provided for.<sup>1</sup> And where the lease provides for a test well within a given period and a forfeiture for failure to comply with such condition and also provides for the payment of a fixed rental during the period of the default, it is held that in case of a breach of the condition, the lessor can declare a forfeiture and also recover the rent provided for the failure to comply with the condition.<sup>2</sup> But as the payment is in the nature of a penalty for the breach and was evidently intended as compensation to the lessor, in lieu of the forfeiture, it is doubtful if a court of equity would permit the lessor to recover the premises through a forfeiture for the breach and also a penalty, or additional sum, because of such forfeiture.<sup>3</sup>

§ 177. Same — When lessor can recover. — A fixed rental to be paid until the completion of a well for oil,

<sup>1</sup> Where an option for a lease provides that lessee shall drill the well provided for or pay a given rental, and the lease also provides that a failure to do either shall render the contract void, the lessee cannot elect to do neither, but on failure to complete the well must pay the royalty provided for. *Jackson v. O'Hara*, 188 Pa. St. 233; 33 Atl. Rep. 624. Under the Curtis Act, Sec. 16, approved June 28, 1898, preventing the collection of royalty upon mining leases in the Indian Territory, royalty due before the passage of the act, would not be effected. *S. W. C. & I. Co. v. McBride* (Sup. Ct. U. S., May, 1902), 185 U. S. 499.

<sup>2</sup> A provision that an oil lease shall be void if well is not completed, as stipulated for, and that a failure to complete a well for two years will enable lessor to recover a fixed annual rental for the period of the default, will enable the lessor to forfeit the lease, for non-performance of the condition and also recover the royalty, in assumption. *Miller v. Logan*, 31 Pitts. Leg. J. 217; *Conger v. Trans. Co.*, 165 Pa. St. 561.

<sup>3</sup> See, *contra*, *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 132; 52 N. E. Rep. 168.



cannot be avoided because the lessee never entered upon the demised premises, as this would be due wholly to his own neglect, and the rent is due and payable, unless he was prevented, by the lessor, from completing the well.<sup>1</sup> The lessee would be liable for the royalty upon a given number of wells, where the lease so provided, even though such wells were drilled by his assignee;<sup>2</sup> the obligation to pay the royalty provided for in the lease would not cease with a failure to use the oil or gas produced from the demised premises, as the obligation to pay royalty would only terminate with a surrender of the lease,<sup>3</sup> and even though the premises should cease to produce mineral at all, where a fixed rent is provided for, it has been held to be no defense to the obligation to pay such rent.<sup>4</sup>

§ 178. *Same — When right to ends.* — Rent can usually be recovered up to the date when the lease is surrendered or the lessor recovers possession of the premises, but

<sup>1</sup> *Lawson v. Kirchner*, 50 W. Va. 344; 40 S. E. Rep. 344; *Wheesling v. Philipps*, 10 Pa. Sup. Ct. 634; *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95; *Leatherman v. Oliver*, 151 Pa. St. 646; *McMillan v. Phila. Co.*, 159 Pa. St. 142.

<sup>2</sup> The original lessee would be liable for the fixed rent provided for in a lease, upon every well drilled, although the same were drilled by his assignee and the lessor had full knowledge thereof and had not demanded rent from such assignee, as the assignment would not release the lessee from his covenant. *Pittsburg Con. & Co. v. Greenlee*, 164 Pa. St. 549; 30 Atl. Rep. 489.

<sup>3</sup> *Double v. Union, H. & L. Co.*, 172 Pa. St. 388; 33 Atl. Rep. 694. The assignment by a father of his interest in royalties under an oil lease executed by both him and his son, will not constitute a severance of the premises and apportionment of the rent in subsequent legal proceedings. *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 38 Atl. Rep. 1021.

<sup>4</sup> *Springer v. Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986. The failure of the lessor's wife to sign an oil lease, where lessee has continued to operate under the lease, with knowledge that she had not signed, will not affect the right to collect the royalty. *Kunkle v. Peoples Gas Co.*, 165 Pa. St. 133; 30 Atl. Rep. 719.

not subsequent to that period.<sup>1</sup> Where the tenant refuses to either surrender possession or pay the rent, it is recoverable up to the date of the suit,<sup>2</sup> but rent cannot be recovered after an abandonment of the premises by the lessee.<sup>3</sup> And although no notice of the abandonment was given by the lessee, if he publicly and openly quits the lease and removes his casing and machinery from the well, this would, of itself, be sufficient notice of the abandonment to the lessor, and he could not recover subsequently accruing rent.<sup>4</sup> No royalty can be recovered, after expiration of the tenancy, although the lessee remains in possession for a period subsequent to the expiration of the term, where he had long ceased to use the premises before the demand for additional royalty,<sup>5</sup> and especially would this be true where the demand was not made until after the execution of a second lease, by the lessor, for this would be evidence of an intention to regard the term of the lessee as at an end and rent thereafter could not be recovered.<sup>6</sup>

<sup>1</sup> *Diamond Glass Co. v. Tennell*, 22 Ind. App. 132.

<sup>2</sup> But where the tenant refuses to either surrender the lease or pay the rental, rent can be recovered up to the date of the surrender or date of trial and recovery of possession by the lessor. *Bettman v. Shadle*, 22 Ind. App. 542; 58 N. E. Rep. 662. *Douthett v. Gibson*, 11 Pa. Sup. Ct. 543; *Diamond Glass Co. v. Tennell*, 22 Ind. App. 132.

<sup>3</sup> Rent under an oil lease can be recovered up to but not subsequent to an abandonment of the lease. *Moon v. Pitts. Plate Glass Co.* (Ind. App.), 56 N. E. Rep. 108.

<sup>4</sup> Although no notice of an abandonment is given, where the lessee publicly and openly quits the lease and removes his machinery, no rent can subsequently be recovered by the lessor. *May v. Hazelwood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 232.

<sup>5</sup> *Williams v. Guffy*, 178 Pa. St. 342; 35 Atl. Rep. 875.

<sup>6</sup> A subsequent leasing of land covered by an oil lease is evidence of an intention to claim a forfeiture, and after such second lease, the lessor cannot recover rent from the first lessee. *Wolf v. Guffy*, 161 Pa. St. 276; 28 Atl. Rep. 1117. A lessee is not chargeable with bad faith in failing to account for royalty, where the amount stipulated for is a por-

§ 179. **Same — Implied covenant for.** — What experience has taught the courts in the oil and gas regions to be customary and fair conditions, as regards the payment or collection of rent or royalty, upon such classes of mineral, have not infrequently been incorporated into the contracts of the parties, as implied covenants in regard to the payment of such rent or royalty. For instance, where a lease provides for a fixed rental upon a gas well, conditioned to be paid "so long as gas shall be sold therefrom," since it would manifestly be unjust to let the lessee either wholly fail to sell the gas at all, or to give it all away, to avoid payment of the royalty, the court would hold such covenant to carry with it the implied obligation on the lessee's part, to market all the gas produced from the well.<sup>1</sup> And, conversely, a covenant to pay rent upon a gas well, has been held subject to the implied condition that it must remain "a gas well," in order for the rent to be collected. And where, owing to no fault of the lessee, the well is so flooded with salt water as to prevent a production of gas therefrom, no rent could subsequently be collected.<sup>2</sup>

§ 180. **Assignment of lease — Effect of.** — An assignment of an oil and gas lease is not different in any essential respect from an assignment of any other lease for mining purposes, except so far as the particular covenants of leases for oil and gas would differ from the covenants and conditions of leases of the solid minerals. The rights and obligations of the respective parties to the assignment

tion of the profits, if the expenses exceeded the profits, at the date a settlement was requested. *Poterie Gas Co. v. Poterie*, 179 Pa. St. 68; 36 Atl. Rep. 232.

<sup>1</sup> *Iams v. Carnegie Nat. Gas Co.*, 194 Pa. St. 72; 45 Atl. Rep. 54.

<sup>2</sup> *McConnell v. Lawrence Nat. Gas Co.*, 30 Pitts. Leg. J. 346. But see, *contra*, *Springer v. Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986, where it is held the obligation to pay rent does not terminate although the premises do not produce mineral.

are judged by substantially the same general rules of law. In either instance the assignee would take no greater estate or interest than his assignor had in the lease;<sup>1</sup> if he acquired but an undivided interest in the tenancy he would succeed to the rights and corresponding liabilities, incidental to such interest,<sup>2</sup> and even if the rights or interest of the assignor were not as extensive as the assignee supposed, or although the obligations were more onerous than he was led to believe, this would not affect the interests of the lessor of the premises, but he could insist upon a performance of the conditions and covenants of the lease and enforce the same, as against the assignee.<sup>3</sup>

**§ 181. Same — Liability of assignee for rent or royalty.** — An assignee of an oil or gas lease is liable for all royalty due during the period of his tenancy.<sup>4</sup> He is liable upon the covenant for rent, although he may never have actually entered into possession of the leased premises, if the lease contemplates such payment, on a failure to complete a well, which has not been completed, as provided for.<sup>5</sup> The liability for royalty or rent could not be avoided, for the period while the assignee was in possession, by a subsequent surrender of the lease, but the surrender would only stop the rent from accruing to the lessor

<sup>1</sup> The assignee of an oil lease takes the same and no greater rights than his assignor had. *Henderson v. Ferrell*, 183 Pa. St. 547; 38 Atl. Rep. 1018.

<sup>2</sup> An assignee of an interest in a lease is jointly liable with the original lessee for the performance of the covenants. *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624; *Fennell v. Guffey*, 155 Pa. St. 38; 25 Atl. Rep. 785.

<sup>3</sup> So far as the lessor is concerned an assignee of an oil lease buys at his peril and is bound to ascertain if the lease has been forfeited prior to his purchase. *Carnegie Nat. Gas Co. v. Phila. Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

<sup>4</sup> *Coultner v. Conemaugh Gas Co.*, 14 Pa. Sup. Ct. 553.

<sup>5</sup> *Edmonds v. Maunsey*, 15 Ind. App. 399; 44 N. E. Rep. 196.

in the future;<sup>1</sup> nor would it be a sufficient answer to the demand for rent to say that the wells could not to be operated at a profit to the assignee,<sup>2</sup> or that it had been scientifically ascertained and determined that no oil or gas was deposited upon or in the leased premises, unless such an exception to the payment of rent was conditioned in the lease.<sup>3</sup> But in the assignment of an oil lease and a payment by the assignee, a stipulation for an additional payment in case of the discovery of oil, would not constitute a covenant running with the land, so as to affect a subsequent grantee of the premises, but would be held to be a mere bonus paid by the original assignee of the lease.<sup>4</sup>

**§ 182. Same — Liability upon covenant to sink wells. —** The covenant to put down sufficient wells to drain the land, like any of the other covenants designed for the protection of the lessor, can be enforced against an assignee of the lessee the same as the original lessee,<sup>5</sup> and the fact that the lessee or assignee had sunk wells upon surrounding or adjoining tracts of land sufficient to demonstrate the futility of operations upon the leased premises, would be no defense, for this is not the terms of the covenant, nor an exception to the obligations thereof.<sup>6</sup> But the assignee

<sup>1</sup> An assignee of a lease who holds the lease without drilling the wells provided for a year and then surrenders same, is liable for the royalty that accrued during the period he held the lease. *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22.

<sup>2</sup> And it is no defense that wells in the vicinity showed that such wells would have been unproductive. *Gibson v. Oliver*, 158 Pa. St. 277; 27 Atl. Rep. 961.

<sup>3</sup> *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219.

<sup>4</sup> *Fisher v. Guffey*, 193 Pa. St. 393; 44 Atl. Rep. 452.

<sup>5</sup> *Young v. Vandergriff (Pa.)*, 30 Pitts. Leg. J. (N. S.) 89.

<sup>6</sup> "Sinking wells on surrounding tracts is not a defense to a covenant to sink same on the demised premises." *Jamestown Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151.

of an oil or gas lease would not be liable for damages for the breach of a covenant to sink a well occurring subsequent to an assignment of the lease by such assignee, for the liability of the assignee upon the express or implied conditions of the lease would terminate with his transfer of the tenancy to another and he would not generally be liable for the neglect or default of his grantee, unless he had personally obligated himself so to be.<sup>1</sup>

§ 183. **Injuries to well — Liability for.** — For a willful or negligent injury to an oil or gas well, or a resulting injury to the machinery and appliances, or other property, connected with the mining operations, the wrong-doer or party causing such injury would be liable for the damage to the owner, to the same extent that he would for a like injury to other mining property.<sup>2</sup> On account of the peculiar nature of the property, however, a given act might be considered actionable, as applied to an oil or gas well, which would not furnish a cause of action, in the case of other mining property, for the reason that an injury would result to the property in the one instance, while it would not, in the other. Accordingly, statutes have been passed in some of the States where oil and gas are found, in the United States, furnishing a specific remedy for certain injuries to this class of property.<sup>3</sup> Under the Pennsylvania statute, for instance, one is required to plug an abandoned well, to prevent injury from fresh water, that would otherwise be absorbed by the oil-bearing rock, and for a neglect to perform this statutory

<sup>1</sup> The assignee of an oil lease is not liable for damages for the breach of a covenant to sink a well, where the breach occurs after an assignment of the lease by such assignee. *Watt v. Equitable Gas Co.*, 29 Pitts. Leg. J. (N. S.) 221; 43 W. N. C. 215.

<sup>2</sup> *Davidson v. Torpedo Co.*, 188 Pa. St. 335; 41 Atl. Rep. 649.

<sup>3</sup> See Statutes Pennsylvania, Ohio, Indiana and West Virginia.

duty an action would lie on the part of the owner or lessee of the injured well.<sup>1</sup> But in the absence of a breach of some statutory duty, or the violation of an obligation resulting from a contractual relation, the same rules of law would determine the liability of the party causing an injury to an oil or gas well that would apply to other mining property, and in the absence of any intentional or wrongful conduct or neglect, there would, generally, be no liability.<sup>2</sup>

§ 184. Same — Drainage through adjoining wells. — It has been held in Ohio that a landowner has a right to drill wells for oil and gas, upon his own land, notwithstanding they may result in the drainage of the land of an adjoining property owner, and that the latter would have no cause of action for the drainage, but his only remedy would be to drill wells upon his own land to prevent such drainage.<sup>3</sup> In the absence of a design to injure the adjoining property owner, or some evidence of a willful wrong, or fraudulent intent, this would seem to be consistent with the prerogative of a landowner and the nature of the property in oil or gas. A lessee cannot be compelled to pay royalty for oil or gas which percolates, naturally, into a well upon an adjoining leasehold, which he is working in

<sup>1</sup> A lessee who comes into possession of an oil lease is entitled to recover for his resulting injury from the failure of the preceding lessee to plug an abandoned well, as provided by the Pennsylvania statute, so as to prevent fresh water from being absorbed by the oil-bearing rock. *Steelsmith v. Aiken*, 14 Pa. Sup. Ct. 226.

<sup>2</sup> A contractor is not liable for an injury to an oil well from the explosion of a squib shot, unless he was negligent in some way, in putting off such shot, or his contract created a liability therefor. *Davidson v. Humes Torpedo Co.*, 188 Pa. St. 335; 41 Atl. Rep. 649.

<sup>3</sup> A landowner has a right to drill wells on his own land and an adjoining owner has no right to damages, but must drill wells near the division line to prevent such drainage. *Kelly v. Oil Co.*, 57 Ohio St. 317; 39 L. R. A. 765; 49 N. E. Rep. 399.

good faith.<sup>1</sup> But where a lessee intentionally drains the leased premises, through wells upon an adjoining tract, to avoid payment of the royalty, the lessor could recover royalty on all mineral so drained and wrongfully removed,<sup>2</sup> and where two adjoining leaseholds are drained from one well, it is held, in Pennsylvania, that each lessor is entitled to such proportion of the royalty, on the entire amount of mineral produced, as the area of his land bears to that of the other lessor.<sup>3</sup>

§ 185. **Abandonment of lease.** — If the only consideration moving to the lessor of an oil or gas lease, is the prospective royalty on the oil or gas to be discovered, a failure to prospect the land leased, for a reasonable period, will be held to constitute an abandonment of the lease.<sup>4</sup> An abandonment will also result from a failure to proceed with test operations for oil or gas, within a reasonable time after a test well goes dry.<sup>5</sup> And even though an oil lease

<sup>1</sup> A lessor cannot compel an accounting from the lessee for royalty due on oil taken from leaseholds belonging to the lessee, adjoining that of the lessor, unless bad faith can be shown in drilling on the adjoining leaseholds, or fraud upon the lessor. *Adams v. Stage*, 18 Pa. Sup. Ct. 308.

<sup>2</sup> *Kleppner v. Lemmon*, 176 Pa. St. 502; 85 Atl. Rep. 109. A lessee who refuses to sink a well upon the lease of his lessor, but sinks a well upon an adjoining lease and drains such lessor's land, is liable to such lessor for the royalty provided for in his lease on all oil taken from such adjoining well, until a forfeiture of the lease. *Kleppner v. Lemmon*, 197 Pa. St. 430; 47 Atl. Rep. 853.

<sup>3</sup> Where a lessee drains two oil leases from one well, each lessor is entitled to such proportion of the royalty on the entire amount of oil produced as the area of his land bears to the land of the other lessor. *Kleppner v. Lemmon*, 198 Pa. St. 581; 48 Atl. Rep. 483.

<sup>4</sup> *Federal Oil Co. v. West. Oil Co.*, 112 Fed. Rep. 373; *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep. 178; *Ray v. West. Pa. Nat. Gas Co.*, 138 Pa. 576; *Crawford v. Ritchey*, 48 W. Va. 252; *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035.

<sup>5</sup> *Aye v. Philadelphia Co.*, 198 Pa. St. 451; 44 Atl. Rep. 555.



provides that it shall continue as long as paying mineral is found, where no oil is discovered and the lessees remove their machinery, they will not be permitted to claim the tenancy, years afterwards, on the discovery of valuable oil deposits, by a second lessee, but will be held to have abandoned their lease.<sup>1</sup> But where a lease provides for the boring of two wells, the mere fact that the lessee pulled the casing, removed the rig and plugged the first well, after using it for two years, would not authorize the lessor to enter and take possession of the leased premises and claim an abandonment of the lease.<sup>2</sup> And it is always a question of fact, where the matter is in issue in a controversy, as to whether certain acts do or do not constitute a working, sufficient to prevent an abandonment of an oil or gas lease, and the court should submit such issue to the triers of the facts and should not, as a matter of law, hold that any given acts will or will not constitute a working, sufficient to establish, or prevent an abandonment.<sup>3</sup>

§ 186. *Same — Lessee's right to casing and fixtures.* — All the tubing, casing, drive-pipe, rig and machinery, used by the lessee of an oil or gas lease, can be removed by him, on abandonment of the lease, as such appliances are held, by the courts, to be mere trade fixtures,<sup>4</sup> which do

<sup>1</sup> *Calhoon v. Neely*, 201 Pa. St. 97; 50 Atl. Rep. 967; *Crawford v. Ritchey*, 48 W. Va. 252; *Venture Oil Co. v. Frets*, 152 Pa. St. 451; *Wagner v. Mallory*, 58 N. Y. Supp. 526.

<sup>2</sup> *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. 249; 41 Atl. Rep. 739.

<sup>3</sup> *Forney v. Ward* (Texas, 1901), 62 S. W. Rep. 108. "The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself; and, unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others." *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 42 S. E. Rep. 655 (W. Va. 1902).

<sup>4</sup> *Siler v. Globe & Co.*, 21 Ohio Cir. Ct. Rep. 284.

not become a part of the real estate, by virtue of their use and annexation to the land, for the purposes of the lease. Nor would a recovery by the lessor, in ejectment, entitle him to such fixtures, brought upon the premises by the lessee.<sup>1</sup> And even an agreement by the lessee that he would leave such fixtures upon the premises, if paying oil or gas was not discovered, would not defeat his title, where no mineral at all was found, as the agreement would be construed as contemplating a discovery of mineral, but not in paying quantity, as a condition precedent to the transfer of the title to such fixtures.<sup>2</sup> But where there was a stipulation in the lease that the lessor was to have the right to purchase the casing and fixtures of the lessee, at a certain price, on failure of the well to produce paying oil or gas, on failure to get a marketable quality of oil, the lessor would be held entitled to pay the amount agreed upon for the fixtures and the title to the well would then vest in him, along with the fixtures.<sup>3</sup> And in the absence of such agreement, while the lessee would be held to have the right to remove the fixtures, he would be required to exercise the right within a reasonable time after the termination of the tenancy, and where the right was not attempted to be asserted until several years after the expiration of the lease, he was held to have lost his right to the fixtures by reason of the delay.<sup>4</sup>

<sup>1</sup> *Sattler v. Opperman*, 14 Pa. Sup. Ct. 32; 30 Pitts. Leg. J. 205.

<sup>2</sup> *Evans v. Consumers Gas Co. (Ind.)*, 29 N. E. Rep. 398. See Chapter, *Abandonment*.

<sup>3</sup> *Smith v. Hickman*, 14 Pa. Sup. Ct. 46. The law will not permit a removal of fixtures by a lessee, where the removal would amount to a violation of another of his covenants, as where he agrees to leave the well so that oil can be used therefrom, the pipe could not be taken away. *Ohio Oil Co. v. Griest*, 65 N. E. Rep. 534.

<sup>4</sup> The right to remove fixtures erected under an oil and gas lease must be exercised in a reasonable time after termination of the tenancy, and where the lessee attempted to remove same, four years after the

§ 187. **Forfeiture — Effect of.** — The general principles of the law of forfeiture, as treated under a separate chapter of this work, apply as well to leases for oil and gas, as to other mining leases, but as there are certain applications of the doctrine, that pertain especially to leases for oil and gas, so far as observed, they will be briefly noted here. A failure to complete the test wells, provided for in an oil lease, or to pay the sum provided to keep the lease in effect is held to work a forfeiture of the lease and even an acceptance of the last month's rent — which is usually a waiver of the forfeiture — is held not to constitute a waiver of the lessors' right, by the Federal court, in West Virginia.<sup>1</sup> But, generally, where a lessor avails himself of a clause of forfeiture, he cannot recover the rent for the period covered by the failure to work.<sup>2</sup> If a given time is stipulated for to drill a well, or pay a given sum, a forfeiture cannot be insisted upon immediately upon the expiration of such period, but the lessee would be held to have a reasonable time thereafter, if he so elects, to make the payment provided for and await the forfeiture.<sup>3</sup> And where a lease is to be forfeited on written notice, or failure to complete a well in a given time, no forfeiture can generally result without the notice provided for in the lease.<sup>4</sup>

expiration of the lease, he was held to have lost his right thereto. *Shellar v. Shivers*, 171 Pa. St. 569; 88 Atl. Rep. 95. See chapter, *Abandonment*.

<sup>1</sup> *Duffield v. Michaels*, 97 Fed. Rep. 825. "Where, in an oil lease, causes of forfeiture are specified, it cannot be inferred that there are other causes, not declared in the lease to be such." *Core v. New York Petroleum Co.*, 43 S. E. Rep. 128 (W. Va. 1908).

<sup>2</sup> *Wheeling v. Philipps*, 10 Pa. Sup. Ct. 634.

<sup>3</sup> *N. W. Ohio Nat. Gas. Co. v. Browning*, 15 Ohio C. C. 84.

<sup>4</sup> Where a lease is to be forfeited, on written notice, on failure to complete a well in a given time, no forfeiture can result without the notice provided for, and a second lease, in the absence of such forfeiture, on notice, is void. *South Pa. Oil Co. v. Stone* (Tenn.), 57 S. W. Rep. 374. "To work a forfeiture of an oil lease, there must be a breach of

§ 188. **Same — For lessor's benefit solely.** — A forfeiture clause in a lease is for the lessor's benefit alone and would not furnish the lessee any defense, in an action for a failure to comply with his covenants in the lease, for to permit such a defense would be tantamount to permitting the lessee to take advantage of his own wrong.<sup>1</sup> And where he has forfeited the lease, for a failure to comply with the conditions thereof, the law would not permit the lessee to recover from the lessor the benefit of his work or expenditures, although they were of value to the lessor, for in such case the object of the forfeiture clause would fail and what was intended for a benefit to the lessor would prove a burden and rather an advantage to the defaulting lessee.<sup>2</sup> The forfeiture of the lease, however, would not render the lease void, *ab initio*, so as to divest a cause of action, existing in favor of the lessee, against the lessor, and which occurred prior to the forfeiture.<sup>3</sup>

§ 189. **Same — Relief against in equity.** — Equity will grant relief from a forfeiture of an oil or gas lease, where the object of the forfeiture is to secure the royalty due and the forfeiture does not result from any fraud or wrongful act on the part of the lessee, but simply from

condition expressed in the lease; a breach of an implied covenant not being sufficient." *Core v. New York Petroleum Co.*, 43 S. E. Rep. 128 (W. Va. 1903).

<sup>1</sup> *Evans v. Consumers Gas Co. (Ind.)*, 29 N. E. Rep. 398; *Phillipps v. Vandergriff*, 146 Pa. St. 357; 23 Atl. Rep. 347; *Ogden v. Hatey*, 145 Pa. St. 640; 23 Atl. Rep. 334. The clause of forfeiture in an ordinary oil lease is for the benefit of the lessor, and no act of the lessee can terminate the lease under the forfeiture clause without the lessor's concurrence. *Henne v. South Penn Oil Co.*, 43 S. E. Rep. 147.

<sup>2</sup> A lessee for oil purposes only, who develops a good well of natural gas and then forfeits his lease, cannot recover for his expenditures because the lessor has realized largely from his gas. *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

<sup>3</sup> *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474.

neglect, if the royalty is tendered and the lessor can be made whole, but an enforcement of the forfeiture would result in permanent injury to the lessee.<sup>1</sup> The absence of a legal remedy, in such a case, would bring the matter clearly within equity's jurisdiction, for wrongs of this character were among the first remedied by such courts, and under the doctrine of estoppel the lessor may be prevented, in a court of equity, from asserting a forfeiture, if, by his conduct, subsequent to the acts which amounted to a breach of the covenants, he led the lessee to believe no forfeiture would be claimed, whereby additional labor or expenditures were bestowed or incurred by the lessee, relying upon a further extension of the tenancy.<sup>2</sup> But where the forfeiture has resulted from a violation of a reasonable covenant, intended for the protection of the lessor's interests, and the lessee, prior to the forfeiture, has shown a disposition to ignore his contract; or if his real claim to relief from the forfeiture is due

<sup>1</sup> *South Penn. Oil Co. v. Edgell* (W. Va.), 37 S. E. Rep. 596. For a case wherein the court held a lessee excusable on a covenant to drill a well in a given time where the proof showed it was impossible to haul the machinery and appliances on account of the impassable condition of the roads, see *Fleming Oil & Gas Co. v. South Pa. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203.

<sup>2</sup> And where the conduct of the lessor has led the lessee to believe he did not claim a forfeiture, by which the lessee made additional expenditures, as where the lessor delivered wood to the contractor, employed to drill the well, and boarded his men and assisted in making a dam for water, to be used in making the well, thus inducing the lessee to believe he was satisfied with his efforts at development of the lease, equity will not permit him to insist upon a forfeiture. *Duffield v. Michaels* (W. Va.), 102 Fed. Rep. 820; *Lynch v. Versailles Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. For a case where the conduct of the lessor in acting as if the time for completion of a test well was not regarded as material, was held to amount to a waiver or estoppel upon his part to afterwards assert such delay as a ground of forfeiture, see *Elk Fork Oil & Gas Co. v. Jennings* (W. Va.), 84 Fed. Rep. 839. See also *Ohio Oil Co. v. Huriburt*, 7 Ohio Dec. 321; 14 Ohio Cir. Ct. 144.

solely because of more encouraging prospects, or an increase in value of the leased premises, such relief should be refused.<sup>1</sup>

<sup>1</sup> *Hukill v. Guffey*, 37 W. Va. 425. "Equity will not relieve a lessee who has forfeited his lease by a mere tender of the rent which he might have paid to avoid boring the test well, as provided for in the lease, where no tender of the rent is made until after the forfeiture is effected." *Hukill v. Guffey*, 37 W. Va. 425; 16 S. E. Rep. 544.

## CHAPTER XIII.

### LICENSE TO MINE.

**SECTION 190.** Nature and definition of mining license.

- 191. Distinguished from lease.
- 192. Distinguished from easement.
- 193. License to mine an interest in land.
- 194. Effect of parol license to mine.
- 195. Who may be licensor.
- 196. Powers of the licensor.
- 197. Licensee's interest under license.
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- 199. Implied powers of licensee.
- 200. Licensee under "mining register."
- 201. Same — Licensee bound by rules in register.
- 202. Revocation of the license.
- 203. Same — When licensee deemed a trespasser.
- 204. Assignment of the license.

§ 190. Nature and definition of mining license.—A license is an authority or power to make use of land in some specific way, or to do certain acts, or a series of acts, upon the land of another.<sup>1</sup> A license may be created either by express agreement, or it may be implied from inducements or representations of the licensor.<sup>2</sup> It is in the

<sup>1</sup> Tiedeman on R. P., § 651; Taylor, Landlord and Tenant, § 237 *et sub.* A license does not pass any estate in the land. *Cook v. Stearns*, 11 Mass. 536; *Munford v. Whitney*, 15 Wend. 390; *Clute v. Carr*, 20 Wis. 531; 3 Kent's Com. 452; B. & W. L. C., p. 481. It is a mere incorporeal hereditament. Balnb. on Mines, p. 300; *United States v. Gratiot*, 14 Pet. (U. S.) 526; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; *Traut v. McDonald*, 83 Pa. St. 144; *Kemble C. & I. Co. v. Scott*, 90 Pa. St. 332. See *Lord Mountjoy's Case*, 4 Leon. 147; 9 M. M. R. 175.

<sup>2</sup> A license may be given by parol. Balnb. on Mines, p. 305; *Gesner v. Carns*, 2 Allan (N. B.), 595; *Desloge v. Pearce*, 38 Mo. 588; *Wheeler v. West* (Cal.), 20 Pac. Rep. 45. The mere form of the instrument is not conclusive. *Watson v. O'Hern*, 6 Watts (Pa.), 362; *Moore v. Miller*, 8 Pa. St. 272; *Knight v. Ind. & c. Co.*, 47 Ind. 105. As to licenses by implication, see Tiedeman on R. P., § 654 and cases cited.

nature of a personal interest or right in the land of the licensor;<sup>1</sup> it is terminated by the death of either the licensor or licensee, and cannot be assigned without the consent of the licensor.<sup>2</sup> The licensee, as a general rule, must exercise his privilege within a reasonable time and in a reasonably prudent manner and is ordinarily responsible for all damage resulting proximately from his own negligence or unskillfulness;<sup>3</sup> but he is not ordinarily responsible for any damage which is but the natural consequence of the exercise of his authority.<sup>4</sup> When the license is created by deed or other instrument in writing, it cannot be revoked, except on breach of the condition by the licensee;<sup>5</sup> and where a parol license to mine has been executed by the licensee it can only be terminated by compensation to the licensee and by

<sup>1</sup> *Gillett v. Treganza*, 6 Wis. 343. The license does not necessarily entitle licensee to the mineral. *Funk v. Hildman*, 58 Penn. 329. Nor is it exclusive of the licensor. *Bainb.*, p. 308; *Upton v. Brazier*, 17 Iowa, 153; *Neumeyer v. Andreas*, 57 Pa. St. 446. It is a mere privilege and does not entitle licensee to the possession. *Boone v. Stover*, 66 Mo. 430; *Chenowitch v. Granby Min. Co.*, 74 Mo. 174; *Lunsford v. Mine LaMotte*, 54 Mo. 426. Possession is not an incident of a mining license and the licensee can maintain no possessory action. *Springfield F. & M. Co. v. Cole*, 130 Mo. 1; *Arnold v. Bennett*, 92 Mo. App. 156; *Rochester v. Mining Co.*, 86 Mo. App. 447; *Lowe v. Zinc Co.*, 89 Mo. App. 680.

<sup>2</sup> *Coleman v. Foster*, 37 Eng. Law & Eq. 489; *Ruggles v. Lesure*, 24 Pick. 187; *Cowles v. Kidder*, 24 N. H. 364; *Prince v. Case*, 10 Conn. 375. But as to assignability see *Muskett v. Hill*, 7 Scott, 855; *B. & W. L. C.*, p. 481; *Morrison's Min. Dig.*, p. 206; *In re Riddle v. Brown* (20 Ala. 412), it was held not to be assignable.

<sup>3</sup> *Tiedeman R. P.*, § 651, p. 497, and cases cited.

<sup>4</sup> *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 640; *Kent v. Kent*, 18 Pick. 569; *Sampson v. Burnside*, 13 N. H. 265; *Wilson v. Gibson*, 84 Ala. 228. But the mine must be worked with regard to the surface owner. *Bainb.*, p. 483; *Williams v. Gibson*, *supra*; *Arnold v. Richmond Iron Works*, 5 Cush. 502; 9 M. M. R. 193.

<sup>5</sup> *Muskett v. Hill*, 7 Scott, 855; *s. c.* 5 Bing. N. C. 694; *Fuhr v. Dean*, 26 Mo. 116; *Roberts v. Davy*, 4 B. & Ad. 664; *Tiedeman on R. P.*, § 653 *et sub.*



such a reasonable notice as would be necessary to terminate an ordinary tenancy at will.<sup>1</sup>

§ 191. **Distinguished from lease.** — There is an important distinction between a lease of mining property and a mere license to work the same, and the difference between the two becomes of practical importance in the case of a breach of a condition which would result in a forfeiture of the lessee's interest in the property. Under a lease the lessee has a corporeal interest in the land, which would enable him to maintain the action of ejectment;<sup>2</sup> while a license is a mere incorporeal hereditament, giving the licensee the right of ingress and egress, to take the ore from the land of the licensor, or some other right, agreed upon between the parties, to be exercised in the land of the licensor.<sup>3</sup> Conditions in a lease that would work a forfeiture of the lessee's interest are not favored by the courts, and whenever the condition is susceptible of a double construction, the courts would enforce it, if possible, in such a manner as to

<sup>1</sup> *Harkness v. Burton*, 39 Iowa, 101; *Beatty v. Gregory*, 17 Iowa, 109. This is the rule in Pennsylvania. *LeFevre v. LeFevre*, 54 Penn. 361; *Renick v. Kern*, 14 L. & R. 267; *Swartz v. Swartz*, 4 Barr, 353; *Dark v. Johnson*, 55 Pa. St. 164; 53 *Id.* 206.

<sup>2</sup> *Funk v. Holdman*, 53 Penn. 229; 4 *East*, 469; 54 Penn. 361; 57 Penn. 83. See also *Doe v. Wood*, 2 B. & A. 724; 9 M. M. R., 182; *Masot v. Moses*, 8 M. M. R. 607; *Harlow v. Lake Sup. Co.*, 36 Mich. 105; 9 M. M. R. 47; *Grubb v. Bayard*, 2 Wall. Jr. 81; B. & W. L. C. 467; 9 M. M. R. 199.

<sup>3</sup> *Boone v. Stover*, 66 Mo. 430; *Chenowitch v. Granby Min. Co.*, 74 Mo. 174; *Lunsford v. Mine La Motte*, 54 *Id.* 426; *Bainb.*, p. 300; U. S. v. *Gratlot*, 14 Pet. (U. S.) 526; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Grove v. Hodges*, 55 Pa. St. 504. The distinction in the text, between leases and licenses to mine is recognized in the following cases: *Springfield F. & M. Co. v. Cole*, 130 Mo. 1; *Young v. Ellis*, 91 Va. 297; *Genet v. Del. Coal Co.*, 136 N. Y. 602; *Con. Co. v. Peers*, 150 Ill. 344; *Austin v. Huntsville Coal Co.*, 72 Mo. 535; *Kirk v. Mattier*, 140 Mo. 23; *Paul v. Cragnas (Nev.)*, 59 Pac. Rep. 357; *Plummer v. Hillside Co.*, 160 Pa. St. 483; 20 *Am. & Eng. Enc. Law* (2 Ed.) 777.

obviate the necessity of a forfeiture.<sup>1</sup> But in the case of a license, however, the licensee has no interest in the property, further than that given him by the licensor, and since the licensor has the exclusive right to affix the terms and conditions upon which the privilege can be enjoyed by the licensee, he also has the power to revoke the license for a failure to comply with the stipulations therein contained.<sup>2</sup>

§ 192. **Distinguished from easement.** — A license differs from an easement in that it can be held apart from the possession of the land;<sup>3</sup> it is not a *jus in rem*, but simply a naked authority, in contradistinction from a subsisting right or interest issuing out of the land. A further distinction between a license and an easement arises from the nature of the transaction by which the license and easement are created. If the authority under the license is exercised in pursuance of a contract for the grant of an easement, the licensee can prevent a revocation of the license by an action for the specific performance of the contract.<sup>4</sup> But if the transaction is simply in the nature

<sup>1</sup> *Miller v. Chester Slate Co. (Pa.)*, 18 Atl. Rep. 565; *Taylor's Land. & Ten.*, Sec. 489 *et sub.* Equity abhors a forfeiture. *Munroe v. Armstrong*, 96 Pa. St. 307; *Eastbrook v. Hughes*, 8 Neb. 496; *Chapman v. Wright*, 20 Ill. 125.

<sup>2</sup> *Riddle v. Brown*, 20 Ala. 412; *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Gillett v. Treganza*, 6 Wis. 348; *Wheeler v. West*, 71 Cal. 126; *Sheldon v. Dovey*, 42 Vt. 637; *Huff v. McCauley*, 53 Pa. St. 206; *Rogers on Mines*, 818. But see *Dark v. Johnson* (55 Pa. St. 164), where a license is held irrevocable; and *Beatty v. Gregory* (17 Iowa, 109), holding that a licensee can maintain ejectment. But see *Offerman v. Starr*, 2 Pa. St. 395. See also *Harlan v. Lehigh Co.*, 8 M. M. R. 496.

<sup>3</sup> 54 Penn. 361, cited *supra*. A license is but a *profit a prendre*, and differs from an easement in that it can be held apart from the possession of the land. *Arnold v. Bennett*, 92 Mo. App. at p. 159; *Lindley on Mines*, § 860; *Bainbridge* (4 Ed.), 510; *Fuhr v. Dean*, 26 Mo. 116; *Chitwood v. Lanyon Zinc Co.*, 93 Mo. App. 225.

<sup>4</sup> *Silsby v. Trotter*, 29 N. J. Eq. 228; 3 Mor. Min. Rep. 137. But one enjoying an easement cannot maintain a possessory action. *Nelson v.*

of a license, instead of a contract for the future grant of an easement, the licensee, as before explained, has no interest in the land, and the license, therefore, can be revoked. The distinction becomes of practical importance where there are adjoining tracts of land, and the owner of one tract has a license and the owner of the other an easement upon the land of the adjoining property owner. In such case, if the license involves merely an abandonment of the licensor's easement, upon the licensee's land, and imposes no direct burden upon the licensor's land, the license is then irrevocable, for the obvious reason that an easement can be abandoned by parol.<sup>1</sup> But where the license involves the permanent use of the licensor's land, it can be revoked, for this is nothing more than the grant of an easement, and in order to be valid, must have been acquired by deed or prescription.<sup>2</sup>

§ 193. **License to mine an interest in land.** — From the foregoing definition of a license it will be seen that it is, in legal contemplation, a mere authority or privilege to enter and do some particular act upon the land of another.<sup>3</sup> Strictly speaking a license is but a mere incorporeal hereditament to be exercised in the land of another,<sup>4</sup> and in this particular it differs from a lease which gives the lessee such a corporeal interest in the land as to enable

Nelson, 30 Mo. App. 189. See further *Big Mountain & Co.'s App.*, 54 Pa. St. 361; *Cobb v. Davenport*, 3 Vroom. (N. J.) 389.

<sup>1</sup> See authorities, *supra*. See also *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; 9 M. M. R. 332.

<sup>2</sup> See Cooley on Torts (§ 357 *et sub.*) for a full discussion of the distinctive features between a license and an easement. See also *Rathbone v. McConnell*, 20 Barb. 311; *Wait's Act. & Def.*, Vol. 7, p. 195. Vol. 2, p. 496; *Tiedeman R. P.* and note to § 653, p. 500; *Russell v. Hubbard*, 59 Ill. 337; *Wash. R. P.* 636, 639, and cases cited.

<sup>3</sup> *Ante, idem*; *Caldwell v. Fulton*, 31 Pa. St. 475; *Cook v. Stearns*, 11 Mass. 534.

<sup>4</sup> *Ante, idem*; *Chicago Oil & Co. v. U. S. Pet. Co.*, 57 Pa. St. 83.

him to maintain ejectment.<sup>1</sup> A right to mine ore does not create in the licensee an exclusive privilege to all the ore on the land subject to the license,<sup>2</sup> nor does the license entitle him to the possession of the land,<sup>3</sup> for the license may be held apart from the possession of the land. But although a license is generally defined to be a mere incorporeal hereditament, it does not follow that an interest in land itself may not be conveyed by license, for such an interest is conveyed by a license to dig for mineral.<sup>4</sup> The mineral itself forms a part of the realty, and as the license conveys the right to take the mineral, it certainly creates an interest in the land.<sup>5</sup> It confers the right to enter and occupy the land and is such an interest in lands, tenements and hereditaments as to bring it within the statute of frauds.<sup>6</sup> A license to enter and dig for mineral, therefore, in order to be effectual to give any permanent interest to the licensee, or any right to a continued possession of the land, must be reduced to writing and signed by the parties licensor.<sup>7</sup>

§ 194. **Effect of parol license to mine.**—A parol license cannot be made the foundation of any right or in-

<sup>1</sup> Bainbridge on Mines, p. 800; 15 Am. & Eng. Enc. of Law, p. 594; 57 Penn. 88, *supra*.

<sup>2</sup> Funk v. Holdman, 53 Penn. 229. The licensee acquires no title or interest in the mineral in place, under his license, as the mineral dug belongs to the owner of the land and not to such licensee. Chitwood v. Lanyon Zinc Co., 98 Mo. App. 225; Arnold v. Bennett, 92 Mo. App. 156; Rochester v. Gate City Min. Co., 86 Mo. App. 447. But see, as to interest of lessee, McKee v. Brooks, 20 Mo. 526.

<sup>3</sup> Boone v. Stover, 66 Mo. 480; 54 Penn. 361.

<sup>4</sup> Fuhr v. Dean, 26 Mo. 120; Desloge v. Pearce, 38 Mo. 595. But see, *contra*, Chetham v. Williamson, 4 East, 469; 9 M. M. R. 176.

<sup>5</sup> Wolf v. Frost, 4 Sandf. Ch. 72; Coll. on Mines, 7 (74 Law Lib. 16); Arnold v. Stevens, 24 Pick. 106.

<sup>6</sup> *Ante, idem*; Bainb. on Mines, §§ 35, 83.

<sup>7</sup> Bainb. on Mines, § 83; Wood v. Leadbetter, Mees. & W. 838; Desloge v. Pearce, 38 Mo. 595; 2 Amer. Lead. cases (8 Ed.), 701, and cases cited.

terest in real estate, or to the future continuous possession thereof, nor to the continuation of the privilege beyond the will of the licensor.<sup>1</sup> It could only be considered as creating a tenancy at will or by sufferance, and is essentially countermandable and revocable at the will of the licensor.<sup>2</sup> Where such a license is executed, however, the licensee acquires certain rights thereunder, which have been recognized by the courts.<sup>3</sup> If the licensee has entered under the license and placed his own property on the land of the licensor, for the purpose of carrying out his part of the contract, whether such property has become a fixed part of the realty or not, he will be protected from an action of trespass for leaving it, or for entering to remove it from the land, and can maintain an action against the licensor for any interference with it, in violation of the privileges acquired under the license.<sup>4</sup> Under this equitable doctrine the licensee would not only be protected in the removal of his property, but he would also be protected from an action for damages from waste or trespass, for whatever legal acts he may have performed under the privilege given,

<sup>1</sup> *Cook v. Stearns*, 11 Mass. 533; Washb. on Easements, § 19; § 5; *Fuhr v. Dean*, 26 Mo. 116. "A verbal license to dig and carry away ore is revocable at the pleasure of the party to whom it is given." *Riddle v. Brown*, 20 Ala. 412.

<sup>2</sup> *Ante, idem*, and 2 Amer. Lead. Cas. (3 Ed.) 701; *Desloge v. Pearce et al.*, 38 Mo. 599; 25 Mo. 370.

<sup>3</sup> *Piermont v. Barnard*, 2 Seld. 279; *Sampson v. Burnside*, 13 N. H. 264, and for leading case see *Lunsford v. Mine LaMott*, 54 Mo. 426 and cases cited. In Utah it is held, a mere verbal permission to mine, acted upon, cannot be revoked, except by forfeiture for breach of condition. *Ruffati v. Societe des Mines &c.*, 10 Utah, 386; 37 Pac. Rep. 591. And see, also, *Young v. Ellis (Va.)*, 21 S. E. Rep. 480. In the absence of express authority, a license granted by the general manager of a corporation, is void. *Butte &c. Co. v. Ore Purch. Co.*, 21 Mont. 539; 55 Pac. Rep. 112.

<sup>4</sup> *Lygins v. Juge*, 7 Bing. 682; 2 Amer. Lead. Cas. (3 Ed.) 697 and 699; *Desloge v. Pearce et al.*, 38 Mo. 595; *Keogh v. Daniel*, 12 Wis. 163; *Gore v. McBrayer*, 18 Cal. 589; *VanNess v. Paccard*, 2 Pet. 148.

and he would have a perfect right to remove, at pleasure, whatever property he may have placed upon the licensor's land, either by virtue of the understanding between the parties,<sup>1</sup> or by force of any custom or local usage, with reference to which the parties might be presumed to have contracted.<sup>2</sup> But a mere license, unaccompanied with any vested interest in the real estate, created by deed or other writing, and independent of any title acquired by grant, prescription, or adverse possession and claim for the period of the statute of limitations, can give no irrevocable right to hold possession of the realty, as against the owner of the land, and must be deemed to be, in its own nature, countermandable and revocable at the will of the owner of the fee.<sup>3</sup>

§ 195. **Who may be licensor.** — Anyone not under disability to contract, who has such an interest in the freehold as would entitle him to work the land himself, can

<sup>1</sup> *Moore v. Eason*, 11 Ired. 568; *Wilcox v. Wood*, 9 Wend. 349. A license cannot be revoked so as to make an entry made, or acts done under it, a trespass. *Fuhr v. Dean*, 26 Mo. 116. M. M. D. 207.

<sup>2</sup> A title can be acquired to mines by custom alone and such a title was upheld in Cornwall and pronounced good. *Rogers v. Brenton*, 10 Q. B. 26; also *Curtis v. Daniel*, 10 East, 273; *Barnes v. Mowson*, 1 Maule and Sel. 77; *Adol. & Ell. (N. & S.)* 40; *Coll. on Mines*, pp. 22-41; *Bainb. Mines*, pp. 456 and 468; *McGarrity v. Byrington*, 12 Cal. 427. Parties are always presumed to contract with reference to custom. *Santier v. Kellerman*, 18 Mo. 509; *Gleason v. Walsh*, 43 Me. 397. Under the Missouri statute the mining rules and regulations of the landowner, signed by the miner, furnish the contract between the parties and determine the rights and obligations of the licensee. *Lowe v. American Zinc & Co.*, 89 Mo. App. 680; *Rochester v. Mining Co.*, 86 Mo. App. 447; *Springfield F. & M. Co. v. Cole*, 130 Mo. 1; *Arnold v. Bennett*, 92 Mo. App. 156.

<sup>3</sup> 3 Kent's Com. 452; *Cook v. Stearns*, 11 Mass. 533; *Wolf v. Frost*, 4 Sandf. Ch. 72; *Bainb. Mines*, § 83; 2 Am. Lead. Cas. (3 Ed.) 701. But see, *contra*, *Bush v. Sullivan*, 9 M. M. R. 214; *Anderson v. Simpson*, 21 Iowa, 399; 9 M. M. R. 262.

convey the right to work it to another.<sup>1</sup> A tenant for life, when not precluded by restraining words, can either work the land himself, or grant unto another the right, not only to work mines that are already opened, but to work them to exhaustion.<sup>2</sup> A tenant of an estate by curtesy, providing there are mines upon the land, also has the right to grant or work the open mines to exhaustion, although he is not the tenant of the surface.<sup>3</sup> And a party having the right to any mineral interests which there may be in the land of some third party can subsequently convey to another a valid title to the same, and also the right to mine and take away whatever minerals there may be in the land.<sup>4</sup> And so an executor or administrator in whom the title to mines is vested by operation of law, has full power to have them worked, or dispose of them, without any special directions with respect to them, although they may be classed with property of a perishable nature.<sup>5</sup> But a grant by a mining corporation of the right to work all or a part of the mines belonging to

<sup>1</sup> The test for determining the validity of the license is the authority of the licensor to perform the acts licensed. *Brown v. Powell*, 25 Pa. St. 229; *Wait's Act. & Def.* (Vol. 7), p. 212.

<sup>2</sup> *Tracy v. Tracy*, 1 Vern. 23; *Aston v. Aston*, 1 Ves. 264; *Kier v. Peterson*, 41 Penn. St. 361; 44 *Id.* 264.

<sup>3</sup> *Stoughton v. Leigh*, 1 Taunt, 402. But such tenants should not exceed their just proportion of the whole. *Rankins' App.* (Pa.), 16 Atl. Rep. 82; *Hastings v. Campelton*, 3 Yeates (Penn.), 261.

<sup>4</sup> *List v. Cotte*, 4 W. Va. 543; *Caldwell v. Fulton*, 81 Pa. St. 475; *Melton v. Lombard*, 51 Cal. 258; *Williams v. Grancott*, 4 B. & L. 149; *Gibson v. Tyson*, 5 Watts (Pa.), 34; *Weakland v. Cunningham* (Pa.), 5 Cent. Rep. 475; *Stockbridge Iron Co. v. Hudson Co.*, 107 Mass. 290. "One of two or more tenants in common cannot grant a license to take or destroy the substance of the estate. *Wilkinson v. Haygarth*, 12 Q. B. 837. See *Job v. Potton*, L. R. 20 Eq. 84. One tenant in common cannot mine himself nor give a license to another to mine." *Murray v. Haverty*, 70 Ill. 318; *M. M. D.* 206.

<sup>5</sup> *Bainb. on Mines*, 136; *Garrett v. Noble*, 6 Sim. 504.

such corporation, will not pass title to the same, unless ratified by a sufficient number of the stockholders.<sup>1</sup>

§ 196. **Powers of the licensor.**—The licensor has no implied powers over the person or property of the licensee, but he can hold the latter to a strict performance of the conditions of the contract under the license, and can revoke the license for a breach of the conditions by the licensee.<sup>2</sup> Where a condition is capable of a double construction, however, it would perhaps be carried out favorably for the licensee, and the courts would not imply a condition or stipulation in the contract, in order to carry out the interests of the licensor.<sup>3</sup> A covenant, for instance, would not be inferred on the part of the licensee, to work the mine continuously,<sup>4</sup> where the agreement was simply, that the licensee should carry on his mining operations in a safe, skillful and workmanlike manner.<sup>5</sup>

<sup>1</sup> Beach on Cor., § 357 *et sub.* For distinction between a contract and license with a corporation, see Beach, § 21. For construction of California statute, see *Williams v. Gaylord*, 186 U. S. 147.

<sup>2</sup> *Boone v. Stover*, 66 Mo. 480; *Chenowitch v. Granby Min. Co.*, 74 Mo. 174; *Lunsford v. LaMott*, 54 Mo. 426; *Roberts v. Rose*, 3 H. & C. 162; 38 L. J. Ex. 1, 241; 85 *Id.* 52; *Riddle v. Brown*, 20 Ala. 412; *Upton v. Brazier*, 17 Iowa, 153. Where a license to mine is granted for a consideration the licensor cannot refuse to designate the place to mine and thus prevent the right granted, without responding in damages. *Hurd v. Gill*, 45 N. Y. 341; 9 M. M. R. 306.

<sup>3</sup> A clause giving forfeiture is *strictissimi juris*. *Clark v. Hart*, 6 H. L. Cas. 633; *Van Schmidt v. Huntington*, 1 Cal. 70; *Coleman v. Clements*, 23 Cal. 248. The burden of proving the right to a forfeiture devolves on the party setting it up. *Orealcumo v. Uncle Sam G. & L. Min Co.*, 1 Nev. 215. And unless the licensor has elected to act on the forfeiture and acted strictly in accordance with the terms granting him the same, he will not be allowed to claim the right. *Roberts v. Davey*, 4 B. & Ad. 664; *s. c.* 1 Nev. & Man. 443; *Doe v. Banks*, 4 B. & Ald. 407; *Morrison Min. Dig.*, p. 111, § 8.

<sup>4</sup> *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264.

<sup>5</sup> *Quarrington v. Arthur*, 10 M. & W. 335; *Moyers v. Tilley*, 32 Pa. St. 267; *Doe v. Banks*, 4 B. & Ald. 401; *Gorman v. Potts (Pa.)*, 26 W. N. C.



But where the contract of license for mining land provides, and makes it of the essence of the contract, that a certain amount of mineral shall be taken out each year, and that the licensee shall pay a certain royalty on that amount, he is liable for the royalty on the full amount of ore agreed upon, whether he takes it out of the ground or not, and even though a portion of the term is occupied in making preparations to begin the mining operations.<sup>1</sup>

§ 197. *Licensee's interest under license.* — Before the execution of the license, unless it is based upon a valid, subsisting contract, the interest of the licensee is but an inchoate right, similar, in some respects, to the interest of the wife in the lands and tenements of her husband, prior to the latter's death.<sup>2</sup> Where the licensee, however, under a mining license, has entered and made valuable improvements, or other outlay, on the land of the licensor, his rights, under the license, are so far recognized by the courts, that he could recover from the licensor for a subsequent unreasonable revocation of the license.<sup>3</sup> But the

305. But where a test of a mine is a condition precedent to the working, on a failure to make proper test the agreement is forfeited. *Pet. Co. v. Coal &c. Mfg. Co.*, 89 Tenn. 881.

<sup>1</sup> *Jewett v. Spencer*, 1 Ex. 647; 17 L. J. Ex. 367 (reversing s. c. 15, M. & W. 662; *Morrison's Min. Dig.*, p. 36; *Mellers v. Devonshire*, 16 Beav. 252.

<sup>2</sup> *Tiedeman R. P.*, § 115 *et sub.* See *Austin v. Huntsville Coal Co.*, 72 Mo. 535.

<sup>3</sup> *Harkness v. Burton*, 39 Iowa, 101; *Beatty v. Gregory*, 17 Id. 109; *Dark v. Johnson*, 55 Pa. St. 164; *Huff v. McCaully*, 53 Pa. St. 206. But such a right could be terminated by the proper notice. *Desloge v. Pearce*, 38 Mo. 588; *Boone v. Stover*, *supra*; *Upton v. Brazler*, 17 Iowa, 153; *Bush v. Sullivan*, 3 Green (Iowa), 344. "A license to mine for lead ore upon a certain tract will not, unless clearly expressed or necessarily implied, be held to be exclusive." *Upton v. Brazler*, 17 Iowa, 153. In Oregon an exclusive license is held capable of supporting lien. *Stinson v. Hardy*, 27 Ore. 584; 41 Pac. Rep. 116. The doctrine that a licensee

licensee, under such a license, is not regarded as having an interest in the land, and consequently he does not acquire any property in the minerals or ores to be mined, until they have been severed from the soil.<sup>1</sup> Under an optional contract in which the grantee is given the right to work a certain mine or not at his pleasure, he would be held to have a mere license to work the mine, with a power of revocation in the licensor,<sup>2</sup> but where a grant is made by virtue of a written instrument, of the right to dig

can maintain no possessory action is not universally followed. In *Adams on Eject.* (p. 20) it is said: "When a grant of mines is so worded as not to operate as an actual demise, but only a *license to dig*, it seems that a party claiming under such a grant, and *who shall open and work and be in the actual possession of any mines, may, if ousted, maintain ejectment with respect to them.*" This rule is followed in Iowa, in *Beatty v. Gregory* (17 Iowa, 109), where *Bainbridge on Mines*, Sec. 494, and *Collier on Mines*, p. 18, are referred to as also justifying the rule that a licensee in possession, working minerals, may maintain a possessory action therefor, and, except in those sections or States where, by statutory provisions, the absolute title to the mineral is vested in the landowner, or where, by contract, a less interest in the licensee is provided for, it may well be doubted if the recognition of the right in the licensee would not subserve the ends of justice and better preserve the rights of litigants than to recognize an absolute right of possession in the licensor, for this right, coupled with the power of revocation, may often be used to deprive a vigilant and successful miner of his well earned discoveries and reward and give the licensor the fruits of his labors. Along this same line see the late case of *Lytle et al. v. James* (Court of Appeals at Kansas City, Mo., Feb. 2, 1908), 78 S. W. Rep. 287. "One having a right as licensee by contract to remove ore from land for a certain time, revocable only for failure to comply with certain rules and regulations, having no remedy at law against a trespasser, may have injunction, under Rev. St. 1899, § 8649, providing for the writ where adequate remedy cannot be afforded by action for damages."

<sup>1</sup> *Bainb. on Mines*, p. 800; *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81; 15 Am. & Eng. Enc. of Law, 600; *Granby M. & S. Co. v. Turley*, 61 Mo. 375. And a sale before severance by the licensee will not pass a title. *Granby Co. v. Turley*, *supra*.

<sup>2</sup> *Boone v. Stover*, and *Missouri cases*, *supra*; *Carnahan v. Brown*, 60 Pa. St. 25. In such a contract an assignee cannot make the election for the licensee. *Mendenhall v. Klinck*, 51 N. Y. 246.

and mine all of the ore upon a certain tract, the grantee, under such a contract, does not take a mere revocable license, but is regarded as the equitable, if not the legal owner of the mineral.<sup>1</sup>

§ 198. **Same — Licensees rights after severance.** — While the licensee's interest, under a mining license, does not extend to the land itself, and he is not regarded as having an interest in the minerals, until they have been severed from the land,<sup>2</sup> when they have once been taken from the soil and placed upon the surface, he is regarded as the legal owner of the same; can assert his rights either in law or equity, may protect the minerals like any other private property, and maintain all actions for the disturbance of his rights in and concerning the same.<sup>3</sup> But the

<sup>1</sup> *Fairchild v. Dunbar Furnace Co.* (Pa. 1889), 18 Atl. Rep. 443; 15 Am. & Eng. Enc. of Law, 579. As to the words sufficient to convey the title to ore before severance, see *Armstrong v. Caldwell*, 53 Pa. St. 284. "A party having a license to quarry stone on certain premises cannot maintain an action against a third party for stone taken from the same premises." *Freer v. Stotenburr*, 2 Abb. App. N. Y., rev'g s. c. 36 Barb. 641. Subsequent lessee has notice of a prior license where licensee is in possession, or his license is recorded, sufficient to protect him. *Alleghany Oil Co. v. Snyder*, 106 Fed. Rep. 764. In *Riddle v. Brown* (20 Ala. 412), it is held, however, that a mere verbal license to mine vests the title of the mineral mined in the licensee, after it is removed. *Riddle v. Brown*, 9 M. M. R. 219. License to mine iron ore, in Pennsylvania, is not held to be an exclusive privilege. *Johnstown Iron Co. v. Cambria Co.*, 32 Pa. St. 241; 9 M. M. R. 226. See also 55 Pa. St. 9.

<sup>2</sup> Authorities, *supra*; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Bently v. Wood*, 2 B. & Ald. 736.

<sup>3</sup> *Grubb v. Bayard*, 2 Wall. Jr. 81; *Caldwell v. Fulton*, 31 Pa. St. 475; *Cook v. Stearns*, 11 Mass. 524; *Clute v. Carr*, 20 Wis. 531. But see *contra*, even after severance, *Granby M. & S. Co. v. Turley*, 61 Mo. 375; also *Freer v. Stotenburr*, 2 Abb. App. N. Y., rev'g s. c. 36 Barb. 641; *Rochester v. Mining Co.*, 86 Mo. App., p. 450. Although a license to mine was granted at a time when lead only was mined in the locality and it was contemplated to extend the right to lead only, discoveries of zinc will be included in the license, after a market is found for such mineral. *Hosford v. Metcalf* (Iowa), 84 N. W. Rep. 1054. But not if the lease or

grant of a license to work a certain mine does not, necessarily, convey the exclusive right to the minerals taken from the mine to be worked under the license,<sup>1</sup> and unless the rights of the licensee attached to the minerals in their native condition, on the tract covered by the license, under a mere license to dig the minerals, he would only have the privilege to mine the same in the soil of the licensor, and could not maintain replevin against the owner of the land, for such minerals as he himself had raised.<sup>2</sup>

§ 199. **Implied powers of licensee.**—The licensee, under a license to mine, does not acquire any implied power, by virtue of his position, in or concerning the land of the licensor, further than that necessary to enforce the rights given him under the license, and his authority is ordinarily confined to that given him under the license;<sup>3</sup> but it is an old principle of the common law, that where one has a right, he has all the privileges necessary to a

license is expressly limited to mineral of a certain kind. *Verdelite Co. v. Richards* (Pa. Com. Pl.), 7 N. Co. R. 113.

<sup>1</sup> *Funk v. Holdemen*, 53 Pa. St. 229; *Carr v. Benson*, L. R. 3 Ch. App. 524; *Upton v. Brazier*, 17 Iowa, 153. The fact that a license is not exclusive is one of the distinctive features between a license and a lease. *Carr v. Benson*, *supra*; *Silsby v. Trotter*, 29 N. J. Eq. 228; *Bainb.* 308; 55 Pa. St. 9.

<sup>2</sup> *Chetham v. Williamson*, 4 East, 469. "A license to dig ore does not exclude the landlord's right of possession both of the surface and all minerals not covered by the license, subject to the right of the licensee to enter and exercise his license." *Neumoyer v. Andrews*, 57 Pa. 446. M. M. D. 206. Nor would it necessarily confer a right of action as against a third party, holding under the licensor. *Freer v. Stotenburr*, 36 Barb. 641. But a license may, by the terms of the grant, be exclusive. *Harkness v. Burton*, 39 Iowa, 101. And it may be shown by custom to be exclusive. *Sobey v. Thomas*, 39 Wis. 317.

<sup>3</sup> *Lockwood v. Lunsford*, 56 Mo. 68; *Garvey v. Gunther*, 51 Mo. App. 545 at p. 549; *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81; *Bainb.* 300 *et sub.*

of the license, if the same was revoked for good cause, an injunction will lie in favor of the legal owner of the land, to restrain the continuance of the trespass.<sup>1</sup>

§ 201. *Same* — *Licensee bound by rules in register.* — The rights of a licensee under a "mining register," are generally limited by the rules of the licensor contained in the register, and he must conduct his mining operations accordingly,<sup>2</sup> and although, in the case of a lease, conditions that work a forfeiture would be construed less favorably to the lessor, in the case of a license a failure to comply with any of the conditions on which the same was obtained works a complete revocation of the license, and the licensor can, at his election, prevent any further work thereunder.<sup>3</sup> But where the licensee has made valuable discoveries upon the land of the licensor;<sup>4</sup> where he has purchased costly machinery, and been to great expense in opening up and developing his mine;<sup>5</sup> it is hardly to be supposed that a court of equity would allow the owner of the land to work a forfeiture of the

<sup>1</sup> *Lunsford v. LaMotte Lead Co.*, *supra*. Under some rules the miner does not even become the owner of the ore, after severance, but gets only a certain per cent. *Rochester v. Mining Co.*, 86 Mo. App. 447.

<sup>2</sup> *Boone v. Stover*, 66 Mo. 430; *Lunsford v. Lead Co.*, *supra*; *Chenowitch v. Granby Min. Co.*, 74 Mo. 174.

<sup>3</sup> *Ante*, *idem*. *Garver v. Gunther*, 51 M. A. 545 at 549. But the notice of licensor's election must be given. *Muskett v. Hill*, 7 Scott, 855; *B. & W. L. C.* 485. It is a question of fact whether licensee has forfeited. *Beatty v. Gregory*, 17 Iowa, 116.

<sup>4</sup> By statute in Wisconsin a license is irrevocable after valuable discoveries. R. S. Wis., § 1647; *Tipping v. Robbins*, 64 Wis. 546. But see *Tipping v. Robbins*, 71 *Id.* 507.

<sup>5</sup> *Riddle v. Brown*, 20 Ala. 412; *Desloge v. Pearce*, 38 Mo. 588; *Boone v. Stover*, *supra*; *Huff v. McCauley*, 53 Pa. St. 206; *Rynd v. Oil Co.*, 63 Pa. St. 397; *Gillett v. Treganza*, 6 Wis. 343; *Keeler v. Greene*, 21 N. J. Eq. 27; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. (5 Stew.) 248; *Wheeler v. West*, 71 Cal. 126; *Sheldon v. Davey*, 42 Vt. 637; *Roberts v. Rose*, 3 H. & C. 162.

licensee's rights for a failure to comply with a technical and arbitrary rule contained in the mining register,<sup>1</sup> but, on the contrary, where the injury, resulting from a failure to comply with the rules of the mining register, is susceptible of pecuniary compensation, the court would allow a reasonable damage for the breach, and hold the licensor to performance of the contract with the licensee.<sup>2</sup> For instance, a clause to the effect that the licensee shall commence operations by a certain date, although it is such a condition as would work a forfeiture of his rights under the license, for a failure to commence work within that time,<sup>3</sup> it could not be specifically enforced, but the time so fixed is of the essence of the contract only so far as to enable the licensor, after its expiration, to maintain an action for the non-performance of the stipulation.<sup>4</sup>

<sup>1</sup> *Ante, idem.* A license to bore for oil in writing and acted upon, is not revocable. *Dark v. Johnston*, 55 Pa. St. 164; M. M. D. 208. "The expenditure of money upon the faith of a license is to be distinguished from the case of money paid as the consideration for granting the license; in the latter case the mere fact of a consideration paid does not convert the license into a contract giving irrevocable interests." *Id.*; *Huff v. McCauley*, 53 Pa. St. 206. M. M. D. 208.

<sup>2</sup> *Silsby v. Trotter*, 29 N. J. Eq. 228. See also *Manganese Iron Co. v. Trotter*, 29 *Id.* 561; *Harkness v. Burton*, 39 Iowa 101; *Beatty v. Gregory*, 17 Iowa, 109; *Blsp. Prin. Eq.*, § 181; *Oil Creek Co. v. Atl. & C. Co.*, 7 P. F. Sm. 65; *McKim v. White Hall Co.*, 3 N. Y. Ch. 510; *Clarke v. Drake*, 3 Chand. 253; *Fitzhugh v. Maxwell*, 34 Mich. 188. But see *Brown v. Vandergriff*, 30 P. F. Sm. 142.

<sup>3</sup> *Fry. Spec. Per. Con.* 65, 170. Such covenants could not be enforced. *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462. But see *contra*, *Adams v. Orknob Copper Co.*, 7 Fed. Rep. 634; *Missouri cases, supra*, and *Biddle v. Brown*, 20 Ala. 412; *Upton v. Brazier*, 17 Iowa, 153; *Woodward v. Seeley*, 11 Ill. 157; *B. & W. L. C.*, p. 483.

<sup>4</sup> *Fry. Spec. Per. of Con.*, p. 456 *et sub.* So, a rule that required the licensee to work at least two days out of every ten, is held to be complied with, by procuring machinery to work upon the mine, although it would amount to a violation of the condition. *Packer v. Heaton*, 9 Cal. 568. *Wade's Am. Min. Laws*, p. 201 *et sub.* Also *Miller v. Chester Slate Co. (Pa.)*, 18 Atl. Rep. 565.

§ 202. **Revocation of the license.** — As long as a license remains executory, the power to revoke it is undoubted, and since the licensee has no indefeasible right to the enjoyment, he has no remedy by which he can prevent the licensor from prohibiting the exercise of the license.<sup>1</sup> But where the licensee, in the exercise of his license, has been put to considerable expense, and a revocation of the license would result in great damage to him, it being almost impossible to place the parties *in statu quo*, the question whether or not the license can then be revoked, has caused considerable confusion in the decisions of the courts. Some of the authorities hold that the license is even then revocable,<sup>2</sup> while a number of the

<sup>1</sup> *Riddle v. Brown*, 20 Ala. 412; *Upton v. Brazier*, 17 Iowa, 153; *Bush v. Sullivan*, 3 Green (Iowa), 344; *Babcock v. Utter*, 1 Keyes (N. Y.), 397; *Desloge v. Pearce*, 38 Mo. 588; *Funk v. Haldeman*, 53 Pa. St. 229. But whether a license in writing can be revoked, see *Rogers on Mines*, 313; *Dark v. Johnson*, 55 Pa. St. 124; *Veghte v. Rareton & Co.*, 19 N. J. Eq. 154. A reasonable notice of the licensor's determination to forfeit must be given, however. *Harkness v. Burton*, 39 Iowa, 101; *Desloge v. Pearce*, 38 Mo. 588; *Beatty v. Gregory*, 17 Iowa, 109. And the notice must clearly show the licensor's intention to revoke the license. *Muskett v. Hill*, 7 Scott, 855; *B. & W. L. C.*, pp. 485-486. A parol license, not accompanied by delivery of possession, is revocable. *Upton v. Brazier*, 17 Iowa, 153; 9 M. M. R. 243. But where it is executed, see *Wilson v. Chalfant*, 15 Ohio, 248, and *Yunker v. Nichols*, cited in 9 M. M. R. 243; and *Huff v. McCauley*, 53 Pa. St. 206; 9 M. M. R. 268.

<sup>2</sup> *Desloge v. Pearce*, 38 Mo. 588; *Boone v. Stover*, *supra*; *Chenowitch v. Min. Co.*, *supra*; *Cocker v. Cooper*, 1 Cramp. M. & R. 418; *Owen v. Field*, 12 Allen, 457; *Cook v. Stearns*, 11 Mass. 533; *Tiedeman R. P.* 653; *Houston v. Laffree*, 46 N. H. 507; *Foot v. N. H. Co.*, 23 Conn. 223; *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 639; *Clute v. Carr*, 20 Wis. 533. "A parol license to mine for lead ore, unaccompanied by actual possession or the expenditure of money or labor thereunder, may be countermanded by the licensor." *Upton v. Brazier*, 17 Iowa, 153. M. M. D. 208. "A license to mine under which entry and expenditure have been made cannot be revoked arbitrarily; it is analogous to the entry of a tenant at will for farming purposes, and he has the right to the *six months' notice* allowed by the common law in such cases." *Bush v. Sullivan*, 3 Green (Iowa), 344. M. M. D. 208. "A parol license from the owner of land in which the mines are excepted, to the grantee of the mines to enter

cases maintain, on the equitable doctrine of estoppel, and part performance, that the license is then irrevocable.<sup>1</sup> Perhaps the better doctrine is the mean between the two. If the licensor revokes his license in violation of a valid subsisting contract, and thereby produces damage to the licensee, such damages are recoverable against the licensor for the breach and the revocation of the contract.<sup>2</sup> But if there is no valid contract for the continuance of the license, since the length of enjoyment is indefinite, a revocation of the same would not subject the licensor to an action for damages.<sup>3</sup> A mining license, however, if founded on sufficient consideration, is construed a valid subsisting contract, and a revocation of the same would be held a breach of contract, for which the licensor could be held responsible.<sup>4</sup>

and dig them, vests no estate in the licensee, and is revoked by a conveyance of the land to a third person." *Gesner v. Cairns*, 2 Allen (N. B.), 595. M. M. D. 208. A license to enter and remove coal is revoked by sale of the land. *Sunnyside Coal Co. v. Reitz*, 14 Ind. App. 487; 43 N. E. Rep. 46.

<sup>1</sup> *Dark v. Johnson*, 55 Pa. St. 164; *Renick v. Kern*, 14 Serg. & R. 267. This is the Pennsylvania rule. *Lacey v. Arnot*, 33 Pa. St. 169; *Huff v. McCauley*, 53 *Id.* 209; *Blanchard & Weeks Ld. Cas.*, p. 484. Some of the States hold that the licensor must compensate the licensee for expenditures before he can revoke the license. *Rhodes v. Otis*, 33 Ala. 600; *Woodbury v. Parshley*, 7 N. H. 237; *Tiedeman R. P.*, § 653.

<sup>2</sup> *Beatty v. Gregory*, 17 Iowa, 114; *Harkness v. Burton*, 39 *Id.* 101; *Snowden v. Wilos*, 19 Ind. 14; *Silsby v. Trotter*, 29 N. J. Eq. 228; *s. c.* 3 Mor. Min. Rep. 137.

<sup>3</sup> *Tipping v. Robbins*, 71 Wis. 507; *Tiedeman on R. P.*, § 652 *et sub.*

<sup>4</sup> *Beatty v. Gregory*, 17 Iowa, 109; *Harkness v. Burton*, 39 *Id.* 101. But a sale of the premises will generally amount to a revocation. *Fuhr v. Dean*, 26 Mo. 116. "A parol license of mining lands is valid, and can only be terminated by compensation to the licensee or the notice necessary to terminate a tenancy at will." *Harkness v. Burton*, 39 Iowa, 101. M. M. D. 208. "A license to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed notice on the premises that he intended to avoid the license, it should be lawful



§ 203. **Same — When licensee deemed a trespasser.** — Although it is sometimes difficult to determine the exact period at which a license can be revoked, after the licensee has entered under the same and expended money and is in the enjoyment of the rights connected with the granting of the license, it follows from the nature of the transaction and the rights created thereby that there must be some period at which the same can be revoked, for otherwise it would create a permanent interest in the land.<sup>1</sup> The license cannot be revoked, however, so as to render the acts of the licensee thereunder, committed prior to the revocation, or by virtue of the license, a trespass, for the license itself, as authority for the acts done thereunder, would deprive such acts of any tortious or wrongful element.<sup>2</sup> But where the licensee, after a legal revocation of the license, continues to act thereunder, as though his authority still continued, since his conduct in such case is not under or by virtue of the license, but wholly without right, it would be the same as though the license had never existed, and he would be deemed a trespasser for acts committed after its revocation.<sup>3</sup>

§ 204. **Assignment of license.** — A license to mine, being itself a mere personal privilege, or authority in the licensee, to be exercised in the land of the licensor, does not, generally, authorize an assignment by the licensee of the rights secured to him by the license.<sup>4</sup> And the assignee does

for the grantor to re-enter within a month after fixing the notice, and then the license should be void: Held, that notice to the grantee that unless he kept six miners to work, the grantor *would* re-enter at the expiration of a month, did not avoid the license or render the grantor's re-entry lawful." *Muskett v. Hill*, 5 Bing. N. C. 694; 7 Scott, 855. M. M. D. 209.

<sup>1</sup> See definition of License, *supra*, and authorities thereunder.

<sup>2</sup> *Fuhr v. Dean*, 26 Mo. 116 at page 121.

<sup>3</sup> *Lunsford v. La Motte Lead Co.*, 54 Mo. 426.

<sup>4</sup> *Riddle v. Brown*, 20 Ala. 412; *Mor. Min. Dig.*, p. 208. A verbal

not acquire from the assignment, any right to enter upon the premises of the licensor.<sup>1</sup> Where the license is coupled with an option in the licensee to purchase within a certain time, an assignment before the election to purchase by the licensee would terminate both the license and the option, for the latter, like the license, could be exercised by the licensee alone,<sup>2</sup> and although a license is not generally revocable after expenditures and improvements by the licensee, an assignment would have the effect of terminating the rights of the licensee,<sup>3</sup> with a right to remove his improvements.<sup>4</sup> But although a license is not usually assignable, the rule is otherwise where the instrument creates an estate in the grantee amounting to a leasehold interest, unless there is a covenant against assignment, and where the licensee, in addition to the right to enter and search for minerals, is also given the right to raise and carry them away and to convert the same to his own use, this is held to vest such an interest in him as would pass to his assignee by a proper assignment.<sup>5</sup>

license to mine is revocable and personal to the licensee and cannot be assigned. *Riddle v. Brown*, 30 Ala. 412; 9 M. M. R. 219.

<sup>1</sup> *Gesner v. Cairns*, 2 Allen (N. B.), 575.

<sup>2</sup> *Mendenhall v. Klink*, 51 N. Y. 246.

<sup>3</sup> *Dark v. Johnson*, 55 Pa. St. 164.

<sup>4</sup> *Desloge v. Pearce*, 38 Mo. 588.

<sup>5</sup> *Muskett v. Hill*, 5 Bing. New Cases, 694; 7 Scott, 855. "A license to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passes an interest which is capable of being assigned." *Muskett v. Hill*, 5 Bing. New Cases, 694; 7 Scott, 855; M. M. D. 206.

## CHAPTER XIV.

### MINING EASEMENTS.

- SECTION 205. On government land.
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§ 205. On government land. — An easement is generally defined to be a right or liberty that one person has in the estate of another, with the privilege of enjoying the same without profit.<sup>1</sup> With the exception of those rights reserved in a patent, which are similar to the easements reserved in a deed, mining easements on government land are more properly but statutory reservations, being created wholly by legislative enactment;<sup>2</sup> and aside from water rights and rights of way, Congress has never recognized

<sup>1</sup> Bouv. Law. Dict. 515; 2 Wash R. P. 25.

<sup>2</sup> Wade's Am. Min. Laws, § 148, p. 206.

any important mining easements; <sup>1</sup> but the legislatures of the different States have passed laws restricting the rights of other occupants of the public mining land, in such manner as to develop mines and protect the rights and privileges of the miners of such land.<sup>2</sup> But the provisions of such statutes are construed strictly by the courts, and as the mining operations are in the nature of a trespass on the rights of the other occupants of such land, it has been held that the burden of proof is on the miner in such cases, and that he must show not only that the land in controversy was public mining land, but that he entered expressly for purposes of mining.<sup>3</sup> In some States a bond is required from such person to the other occupant of the land, conditioned that he will not infringe on his private rights of property.<sup>4</sup>

§ 206. **Easements recognized by law.**—The acts of Congress referred to as recognizing certain rights as easements, in persons mining on public land, are construed by

<sup>1</sup> R. S. U. S., § 2338, 2339; Wade Am. Min. Laws, pp. 23, 24, 206.

<sup>2</sup> Statutes different States; Act Cal. Apr. 25, 1855; Wade Am. Min. Laws, p. 206. Subsequent locator takes subject to water easement, under R. S. U. S., § 2339; *Jacob v. Day*, 111 Cal. 571; *Broder v. Water Co.*, 101 U. S. 274; 20 Am. & Eng. Enc. Law (2 Ed), p. 760 *et sub*.

<sup>3</sup> *Welmer v. Lowry*, 11 Cal. 104; *Stokes v. Barrett*, 5 *Id.* 86; Wade Am. Min. Laws, *supra*. "Where plaintiff in a suit to quiet title to a mining claim claims under a location subsequent to a conflicting location by defendant, who also asks to have his title quieted, the burden is on each of the parties to prove the validity of their location, the plaintiff having the duty of taking the lead in such proof." *Shattuck v. Costello* (Ariz. 1902), 68 Pac. Rep. 520.

<sup>4</sup> Wade's Am. Min. Laws, § 148, p. 207; Sts. Cal. Act. 1855, p. 145. "There being no reservation in a grant, the grantee takes all that to which the government was entitled." *Doran v. Cent. Pac. R. Co.*, 24 Cal. 245; M. M. D. 130. For construction of the government statute, with reference to the extra-lateral rights of mineral claimant, see *St. Louis Min. & Mil. Co. v. Mont. Min. Co.* (Mont. 1902), 113 Fed. Rep. 900.

the courts as simply confirmatory of the rights and privileges acquired before the enactment of the law, and not as granting any new easements to persons so engaged.<sup>1</sup> The legislatures of the different States have also passed laws establishing certain easements in favor of persons engaged in mining on public land, but it is doubtful, if the constitutionality of some of these statutes were brought into question, if the rights acquired thereunder would be considered constitutional by the courts.<sup>2</sup>

§ 207. **Of placer claimant.** — Placer mines consist of deposits of gold that have been displaced; such as have been dislodged by the erosion of years and the action of the elements and deposited at a distance from their original location.<sup>3</sup> Such deposits are frequently found in the beds of ancient streams and the alluvial soil of the valleys.<sup>4</sup> Placer claims, however, are not controlled by the provisions governing the location of lode claims, and such mining is regulated almost entirely by the local legislatures.<sup>5</sup> But the amount of land that can be held by the claimant of a placer mine is regulated by the United States statute,<sup>6</sup> and no individual claimant can hold over twenty acres of land,<sup>7</sup> and no association of persons can successfully lay

<sup>1</sup> Wade's Am. Min. Laws, § 50, p. 78; Stat. U. S., §§ 2338-2339.

<sup>2</sup> Stat. different States; *Stokes v. Barrett*, 5 Cal. 36; *McClintock v. Brinden*, 5 *Id.* 97. The above reference is to the early acts of the Western States warranting an interference with previously acquired rights, by miners upon public land. See B. & W. Ld. Cas., p. 162 and cases cited. See the late case of *Hell v. Martin* (Tex. 1903), 70 S. W. Rep. 430, for such holding in Texas. See, however, *Colquitt-Tignor Min. Co. v. Ragan* (Tex. 1902), 68 S. W. Rep. 154.

<sup>3</sup> Wade's Am. Min. Laws, § 43, pp. 70-71.

<sup>4</sup> *Moxan v. Wilkinson*, 2 Mont. 421.

<sup>5</sup> Wade's Am. Min. Laws, § 44, pp. 71-72.

<sup>6</sup> See R. S. U. S. for '79, § 2329.

<sup>7</sup> R. S. U. S., § 2331.

claim to over one hundred and sixty acres.<sup>1</sup> And the tract claimed in either instance would have to be surveyed by the claimant, unless it is on land already surveyed by the government, in order to identify the claim,<sup>2</sup> and the question whether a placer claim is required to be recorded is always to be determined by the statute of the State where the tract of land is located.<sup>3</sup>

§ 208. **Rights of tunnel claimants.** — Although there is an apparent discrepancy between the sections of the United States statute concerning the rights of tunnel owners and prior discoverers of lodes on the line of their tunnel,<sup>4</sup> there is no doubt but that the owner of the tunnel has the right to locate claims, on the line of his tunnel, for the distance of three thousand feet, from the “face” or commencement of the tunnel.<sup>5</sup> But as the right given the owner of the tunnel is a mere right to *locate* claims upon the line of his tunnel,<sup>6</sup> before the discovery of a lode, upon the line of his tunnel, he could not be said to be in possession of such lode, and therefore could not exercise the right of location given him by the statute.<sup>7</sup>

<sup>1</sup> Wade's Am. Min. Laws, *supra*.

<sup>2</sup> See U. S. Statute, § 2331; Wade's Am. Min. Laws, pp. 72-73.

<sup>3</sup> *Ante, idem.* As to sufficiency of notice of location, under U. S. Statute, see the late case of McKinley Cr. Min. Co. v. Alaska United Min. Co., 183 U. S. 563.

<sup>4</sup> See R. S. U. S. 79, § 2322. See Mor. Min. Rts. (10 Ed.), p. 208.

<sup>5</sup> Wade's Am. Min. Laws, p. 67, § 38; Enterprise Co. v. Rico Aspen Co., 167 U. S. 108; Campbell v. Elliot, 167 U. S. 116. But see Erhardt v. Boaro, 15 M. M. R. 472; Mor. Min. Rts. (10 Ed.), pp. 207, 208.

<sup>6</sup> See U. S. Sta., *supra*.

<sup>7</sup> Corning Tunnel Co. v. Pell, 4 Colorado, 507; Wade Am. Min. Laws, p. 69. “This became the generally received interpretation of the act until the case of Enterprise Co. v. Rico Aspen Co., 66 Fed. 200, affirmed by the National Supreme Court in 1897, 167 U. S. 108; followed by the case of Campbell v. Elliot, 167 U. S. 116, affirming 18 Colo. 511.” “The court holds that a tunnel duly located and its work diligently

So if a lode is discovered outside the line of the tunnel, prior to its discovery by the owner of the tunnel, such discoverer will have the prior right to locate a claim upon the land so discovered.<sup>1</sup> But when a tunnel is worked for this purpose and a lode is actually cut, no other work on the surface of the land is necessary to perfect such location, and the money and labor expended and performed on the tunnel applies equally to the claims located upon the surface.<sup>2</sup> If the owner of the tunnel, however, fails to work the same for the period of six months, at any one time, he is considered as having abandoned his right to the undiscovered veins on the line of his tunnel and any subsequent discoverer could successfully locate a claim to such veins.<sup>3</sup>

§ 209. **Same — Ditches and drainage.** — The Federal statute recognizes rights of way for ditches and drainage,<sup>4</sup> and drainage has also been the subject of local legislation, and the right of the miner to construct canals and ditches to conduct the refuse matter from his mine, has been generally recognized by the legislatures of the different States.<sup>5</sup> But even before the enactment of such statutes the right to con-

prosecuted holds the right to all lodes not previously known to exist on either side of the bore. That is to say, when a lode is reached the tunnel may elect to take 1,500 feet in one direction or 1,500 feet on the other side or may divide the length, so much on either side. That all locations on lodes not previously known, made within such area, are voidable at the election of the owner of the tunnel." *Mor. Min. Rts.* (10 Ed.) 207.

<sup>1</sup> *Wade's Am. Min. Laws*, pp. 68-69; *Corning Tunnel Co. v. Fell*, *supra*.

<sup>2</sup> *English v. Johnson*, 17 Cal. 108; *B. & W. L. C.* 172-184;

<sup>3</sup> See statute United States, *supra*; see also *Wade's Am. Min. Laws* (pp. 69-70), for an expression of author's views as to effect of tunnel abandonment and resumption of work.

<sup>4</sup> *Stat. U. S.* 1879, § 2339; *Wade's Am. Min. Laws*, pp. 24, 208.

<sup>5</sup> *Wade's Am. Min. Laws*, § 150, p. 208; *Mor. Min. Rts.* (10 Ed.) 164.

struct ditches for drainage was firmly established by the local rules and customs of the miners,<sup>1</sup> and when the rule or custom could be proven, authorizing such a right, and the right thereunder established, an injunction would lie in favor of the miner to prevent an injury to the right acquired under the custom.<sup>2</sup>

§ 210. **Flumes and tailings.**—The Federal statute, however, does not recognize the right of a prior locator of a mining claim, to appropriate the claim of a subsequent locator as a place to construct flumes and deposit the tailings and waste matter from his own mine.<sup>3</sup> And since the custom of “free tailings” has been held to be unreasonable by the courts, a prior locator has no right to allow his tailings to run free in a gulch, if it would in any manner injure the claims and property of persons located further down the gulch.<sup>4</sup> But it has been held to be no infringement of the rights of a subsequent locator, for a prior locator to erect a dam, to confine his tailings and waste

<sup>1</sup> The Federal statutes are only confirmatory. *Jennison v. Kirk*, 98 U. S. 453; *Wade's Am. Min. Laws*, § 150, pp. 208-209; *Baley v. Galligher*, 20 *Wallace*, 670. See also *Quinlan v. Noble*, 75 *Cal.* 250.

<sup>2</sup> *Gregory v. Nelson*, 41 *Cal.* 278; *s. c.* *B. & W. L. C.* 749; *Troilmine &c. Co. v. Chapman*, 8 *Cal.* 392; *Bliss v. Kingdom*, 46 *Cal.* 651; *Wade Am. Min. Law*, p. 209. But if the ditch-owner subverts the ditch for the purpose of depositing refuse matter on the claim of his adjoining property-owner, an injunction would lie to restrain such use, and damages given for the injury done. *Esmond v. Chew*, 15 *Cal.* 137; *B. & W. L. C.* 200-628-752. “If the owners of a ditch constructed for conveying water, use the same peaceably, openly and exclusively under a claim of right, with the knowledge of the owners of the land, for a continuous period of five years, they acquire by prescription an easement over the land for the same.” *Campbell v. West*, 44 *Cal.* 646. *M. M. D.* 85.

<sup>3</sup> *Harvey v. Ryan*, 42 *Cal.* 626; *Nelson v. O'Neil*, 1 *Mont.* 284; *Gregory v. Harris*, 43 *Cal.* 38.

<sup>4</sup> *Lincoln v. Rogers*, 1 *Mont.* 217. In California, operator of a mill is held entitled to tailings properly belonging to waste. *Fox v. Silver Min. Co.*, 108 *Cal.* 369; 41 *Pac. Rep.* 308.



matter and assist him in the prosecution of his work, even though he may flood the claim of a subsequent locator, by reason of the erection of the dam.<sup>1</sup> And although the right of one miner to appropriate the land of another for his flumes and tailings, is not recognized as an easement by the courts, it has been held, under a district rule, that he had a right to appropriate a place for the deposit of his pay dirt and tailings, on the ground that these were his private property and as such he was entitled to protect it.<sup>2</sup>

§ 211. **Implied right to get minerals.** — Under the rule of law that gives the owner of a vested right all the privileges necessary to a full enjoyment of such right, the grantee of the minerals under a given tract has the power, necessarily incident to such grant, to excavate and remove the mineral covered by the grant.<sup>3</sup> But the grant of the minerals may be limited in such a way as to prevent the removal of the ore, except in a given manner, or from a particular portion of the premises, and where such a limitation appears the privilege is restricted, according to the terms of the grant.<sup>4</sup>

<sup>1</sup> *Stone v. Bumpus*, 46 Cal. 218; B. & W. L. C. 749, 825.

<sup>2</sup> *Jones v. Jackson*, 9 Cal. 237. See *Mor. Min. Rts.* (10 Ed.), pp. 172, 174. Land cannot be appropriated for purposes of flumes and tailings, under the doctrine of eminent domain, notwithstanding a local statute may authorize such appropriation, for such use is not of a public nature. *Consolidated &c. Co. v. Cen. Pac. Ry. Co.*, 51 Cal. 269. And see *Wade's Am. Min. Laws*, pp. 209-210, where the constitutionality of such acts is questioned.

<sup>3</sup> *Rowbotham v. Wilson*, 8 H. L. Ca. 343; s. c. 3 E. & E. 752; affirming 6 El. & Bl. 593; 8 El. & Bl. 123.

<sup>4</sup> "Clement and Edward Grubb owned in common the 'Mount Hope estate,' which consisted of several tracts of land, and one-sixth of 'three certain mine-hills, known as Cornwall ore banks.' Clement conveyed to Alfred his half of the 'Mount Hope estate,' designating the

§ 212. **Surface owner entitled to support.**—It is a familiar principle of the law, and one in fact that lies at the foundation of all systems, that every individual must use his own, so as not to injure others in the enjoyment of their legal rights. This principle applies also to the subject-matter of this section, and as it limits the enforcement of all rights recognized in the law, it also curtails the exercise of the rights of the mineral owner, where the mineral is beneath the land of another, and prevents him from taking out the mineral in such a manner as to injure the surface owner in the enjoyment of his legal rights.<sup>1</sup> It would be a clear infraction of the latter's rights to permit

particular tracts, together with the right, etc., 'so far as the said Alfred's right under this conveyance in said Mount Hope furnace is concerned, of the said Clement to raise, etc., for the use of said furnace, iron ore out of three certain mine-hills, etc., known as the Cornwall ore banks, but for so long and such time only as such furnace can be carried on, etc., by charcoal.' Held, that this conveyance granted to Alfred a *limited privilege* to take ore, and did not convey the corporeal estate in the mine-hills that remained in Clement." *Grubb v. Grubb*, 74 Pa. St. 25; M. M. D. 264. As to right to sink shafts, arising from reservation of minerals, see *Hayes v. Pease*, 1 Ch. 567; 68 L. J. Ch. (N. S.) 222 (1901). "A lease which gives the right to take out all the coal beneath a certain surface, confers also the right to make all necessary openings to reach the coal." *Trout v. McDonald*, 83 Pa. St. 144; M. M. D. 181.

<sup>1</sup> *Smart v. Morton*, 5 El. & Bl. 80; *Coleman v. Chadwick*, 80 Pa. St. 81; *Chadwick v. Coleman*, *idem*. "When the surface of land belongs to one man and the subjacent strata belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, independent of the question of buildings, the owner of the minerals is 'bound to leave support sufficient to maintain the surface in its natural state.'" *Humphreys v. Brogden*, 12 Q. B. 789; s. c. 1 Eng. L. & E. 241; M. M. D. 357. "A full reservation of all the coal and the right to get it leaves title to *all* the coal in the grantor, but does not allow him to take it all out of the ground if he cannot get it without leaving sufficient support to the surface." *Harris v. Ryding*, 5 M. & W. 60; M. M. D. 359. "When the surface is entitled to support the question of negligence in the mode of getting the minerals underneath is immaterial." *Brown v. Robins*, 4 H. & N. 186; M. M. D. 359.

the owner of the mineral to remove the natural support from under the land and allow the surface to cave in, and if such latitude were granted the mine owner, the damage caused the surface owner would frequently be in excess of the actual value of the ore found.<sup>1</sup> The authorities are unanimous, therefore, in holding, where the minerals and the surface belong to separate parties, that the owner of the mineral is bound to operate his mines in such a manner as to leave sufficient support for the surface.<sup>2</sup> But where the mineral and the surface belong to the same owner, he could excavate the entire surface, if he so desired, in his quest for ore, provided that in so doing he did not infringe upon the rights of adjoining property owners;<sup>3</sup> and even where the surface and the minerals belong to separate owners, although the owner of the surface is entitled *prima facie* to the support of subjacent strata of minerals,<sup>4</sup> his right thereto could be alienated by express agreement, or if he had made sufficient representations to the owner of the minerals, he would afterwards be barred, under the doctrine of estoppel, from asserting his right to the surface.<sup>5</sup>

<sup>1</sup> Harris v. Ryding, 5 M. & W. 60; Jones v. Wagner, 66 Pa. St. 429.

<sup>2</sup> Farrand v. Marshall, 21 Barb. 409. And where there is nothing to the contrary in the instrument of demise, the right to surface support would be implied. Dugdale v. Robertson, 8 Kay. & J. 695.

<sup>3</sup> Farrand v. Marshall, *supra*.

<sup>4</sup> Dugdale v. Robertson, *supra*. When the easement of lateral support is violated the intent of the adjoining proprietor is wholly immaterial. Victor Co. v. Morning Star Min. Co., 50 Mo. App. 525. But when the self-supporting power of the land has been diminished or additional weight added to the surface, the right does not exist. *Idem*.

<sup>5</sup> And where the right of surface support has been yielded by grant a subsequent purchaser of the surface would take the same subject to such previous grant. Smith v. Darby, L. R. 7 Q. B. 716. "The right to have one's soil remain intact, so that no removal of the adjoining soil shall disturb its integrity, is not an absolute but a qualified right; but the removal of lateral support, by excavation in the adja-

§ 213. **Relative rights of mine and surface owner.** —

The owner of the mineral is entitled to enjoy his property to the fullest extent compatible with the rights of the surface owner, and his rights are not confined by the powers enumerated in his grant.<sup>1</sup> As regards the surface owner, the mine owner's rights are limited, however, to his necessities,<sup>2</sup> and he cannot prevent the surface owner from putting his land to any lawful use,<sup>3</sup> but both are required to use their property so as not to cause unnecessary injury.

cent parcel, is a violation of the right of property, and is actionable, independent of the consideration, whether it was done with or without negligence. *Victor Mining Co. v. Min. Co.*, 50 Mo. App. 525. "When the surface and the minerals belong to separate owners, the owner of the surface is *prima facie* entitled to the support of the subjacent strata; and the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface; but these rights may be varied by express stipulation." *Smart v. Morton*, 5 El. & Bl. 80; 30 Eng. L. & E. 385; 3 Com. L. R. 1004; M. M. D. 357. "Grantee of surface may recover for injury thereto for failure of mine operator to leave proper supports, though such failure occurs before his deed." *Noonan v. Pardee* (Pa.), 50 Atl. Rep. 255. The surface owner's right to support of surface in its natural state is an absolute right. *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438; 33 Atl. Rep. 690; *Robertson v. Coal Co.*, 172 Pa. St. 566; 33 Atl. Rep. 706; *Belle v. Earl of Dudley*, 64 L. J. Ch. (N. S.) 291; 1 Ch. 182. Damages for injury to surface support recoverable when mineral owner injures same. *C. & A. R. R. Co. v. Brandau*, 81 Mo. App. 1.

<sup>1</sup> *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; s. c. 14 Amer. Rep. 322.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> "The owner of a mine beneath the surface, though he have a right of way through the surface soil, has no right so to exercise the same as to interfere with the power of the owner of the land to make any lawful use thereof. The latter may sink a cesspool on his land, though it interfere with a tunnel constructed by the mine owner under the lot." *Park Coal Co. v. O'Donnell*, 7 Leg. Gaz. 149; 4 Luz. L. Reg. 127; M. M. D. 356. The surface owner who retains title to the oil and gas in a tract of land, has an easement on the coal strata therein which will enable him to drill through into the oil or gas. *Chartier's Block Coal*

§ 214. **Same — Custom cannot affect right.** — Since the owner of the surface, as a matter of natural right, is entitled to support from the subjacent strata, the grantee of the minerals, where the surface was reserved, would only take title to so much of the mineral as could be obtained, without injury to the surface, and he would not be permitted to show a custom permitting him to interfere with such right of the surface owner,<sup>1</sup> as a custom to this effect would be in derogation of the right of property and consequently unreasonable and void.<sup>2</sup>

§ 215. **Same — “Lateral” and “subjacent” support.** — The surface owner's easement of support extends not only to the lateral support of his neighbor's land, so far as it may be necessary to sustain his soil in its natural state,<sup>3</sup> but also to the subjacent support of the surface by the underlying strata and subsoil.<sup>4</sup> All that the surface owner is entitled to, however, from the lateral surface owner, is the support of the surface in its natural condition;<sup>5</sup> but, as to the owner of the subjacent soil or mineral,

*Co. v. Mellon*, 152 Pa. St. 286; *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248; 48 Cent. Law Journ. 472.

<sup>1</sup> *Coleman v. Chadwick*, 80 Pa. St. 81.

<sup>2</sup> “A custom to mine coal without leaving supports for the surface is unreasonable; it is destructive to the upper estate; and if it can be allowed as a custom it must be uniform in the region where the premises are situate, and so ancient that the memory of man runneth not to the contrary.” *Jones v. Wagner*, 66 Pa. St. 480; B. & W. L. C. 608; 5 Am. R. 385; *Horner v. Watson*, 79 Pa. St. 242; M. M. D. 359.

<sup>3</sup> *Hunt v. Peak*, 1 Johnson (Eng.), 705. “The owner of land, excavating the same for clay to make brick, may not destroy the lateral support of adjoining ground by digging up to his line and necessitating the fall of the soil of the adjoiner into the clay pit; and is liable in damages for injury so occasioned to the adjoining lot.” *Farrand v. Marshall*, 21 Barb. 409; s. c. 19 *Id.* 380; M. M. D. 359.

<sup>4</sup> *Alloway v. Wagstaff*, 4 H. & N. 307; *Richards v. Jenkins*, 18 Law Times (N. S.), 438; *Dugdale v. Robertson*, 3 Kay & J. 695.

<sup>5</sup> *Farrand v. Marshall*, 21 Barb. 409; *Richards v. Jenkins*, *supra*.

any injury to the surface owner would be actionable, provided the acts causing the injury occurred subsequent to the vesting of the surface right.<sup>1</sup>

§ 216. **Extends to buildings by implication.** — Where the surface owner has granted the minerals beneath the surface to another, the right of surface support extends not only to the soil itself, but also to the buildings erected upon the surface,<sup>2</sup> although it has been held that the mine owner owed no duty as to buildings, subsequently erected.<sup>3</sup> Where buildings or other erections, have been

<sup>1</sup> "The rights and obligations of the owner or occupier of adjacent and subjacent mines are not the same. The surface owner is entitled as against the occupier of adjacent mines or surface, to that support only which the adjacent land and mines afford to his property in its natural condition, and can acquire a right to support for buildings on his land, only by possession or enjoyment for twenty years. The occupier therefore of the adjacent mines, working them so as to subvert buildings on the surface, is not liable to an action unless the buildings have existed for twenty years before the working which has caused the injury; whereas the surface owner may maintain an action against the subjacent mine occupier for an injury to buildings on the surface, however recently erected, if it be before the commencement of the title and possession of the occupier of the mines." *Richards v. Jenkins*, 18 Law Times (N. S.), 438; M. M. D. 360.

<sup>2</sup> *Berkley v. Shafto*, 15 C. B. (N. S.) 79; *Rogers v. Taylor*, 2 H. & N. 828; *Jeffries v. Williams*, 1 Eng. L. & E. 438. The owner of a building has no natural easement for its support by his neighbor's land. *Eads v. Gaines*, 58 Mo. App. 586. The natural easement applies only to the land in the condition that nature left it. *Handlin v. McMannus*, 42 Mo. App. 551. But see *Walters v. Hammond*, 75 Mo. App. 237.

<sup>3</sup> "All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected." *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Am. R. 322; M. M. D. 357. "When there is a severance of the mineral from the surface ownership, with a right by the terms of the award or grant in the mine owner to disturb the surface, the erection of buildings subsequent to the vesting of the right to disturb the surface cannot

constructed for a sufficient time to give a prescriptive right to the subjacent or lateral support, any injury to such right would be held actionable;<sup>1</sup> the owner of the buildings would be entitled to support for the additional weight of the buildings,<sup>2</sup> and damages could be recovered for any injury thereto.<sup>3</sup> It is sometimes held that damages are only recoverable where the excavations were negligently conducted;<sup>4</sup> but as the act of making the excavation and the resulting injury to the surface owner themselves constitute an actionable wrong, the better rule perhaps would not require more to be shown.<sup>5</sup> Recognizing both the right of the owner of the mineral to his property and the surface owners, as well, and that the enjoyment of the one necessarily resulted in injury to the other, some statutes have given compensation to the mine owner, by way of condemnation, from the surface owner,<sup>6</sup> but as the property in mineral in place is usually so difficult to place a value upon, the more satisfactory solution of such conflicting rights would seem to be to hold the mine owner to damages for excavations to the injury of the surface owner, if his rights

vary the rights of the parties." *Rowbotham v. Wilson*, 8 H. L. Ca. 348; s. c., 3 E. & E. 52; 6 El. & Bl. 598; 8 *Id.* 128; M. M. D. 360.

<sup>1</sup> *Hunt v. Peake*, 1 Johnson (Eng.), 705.

<sup>2</sup> *Hamar v. Knowles*, 6 H. & N. 454; *Jeffries v. Williams*, 20 L. J. Ex. 14; *Humphries v. Bragdon*, 12 Q. B. 789.

<sup>3</sup> *Berkley v. Shafto*, 15 C. B. (N. S.) 79; *Hilton v. Whitehead*, 12 Q. B. 738.

<sup>4</sup> *McGuire v. Grant*, 1 Dutch. (N. J.) 357; *Rogers v. Taylor*, 2 H. & N. 828.

<sup>5</sup> *Hamar v. Knowles*, 6 H. & N. 454; *Jeffries v. Williams*, 20 L. J. Ex. 14; s. c. 5 Ex. 792.

<sup>6</sup> "A canal company having the privilege of purchasing the subjacent minerals under Act of Parliament cannot hold the owner of the minerals responsible in damages for injuries occasioned by his mining for them upon the refusal of the company to purchase under the act." *Wyrley Can. Co. v. Bradley*, 7 East, 368. "And so though the working may cause the surface to subside." *Fletcher v. Great W. R. Co.*, 4 H. & N. 242; *Great W. R. Co. v. Fletcher*, 5 H. & N. 689; M. M. D. 363.

were the more valuable and he was able to respond in damages,<sup>1</sup> but otherwise to restrain all threatened injuries to the surface owner.<sup>2</sup>

§ 217. **Same—Railroad entitled to.**—A grant of right of way to a railroad, for railroad purposes, carries the right of surface support, although the title to the minerals may be reserved in the land owner.<sup>3</sup> A subjacent or lateral owner would not be permitted to interfere with the necessary surface rights of the railroad company;<sup>4</sup> the right would attach even beyond the limits of the land sold or granted;<sup>5</sup> and would extend not only to the railroad itself, but also to a superstructure, placed by it on the land, notwithstanding it might require more than usual support.<sup>6</sup> But where the law — or an act of the

<sup>1</sup> *Aspden v. Seddon*, L. R. 10 Ch. App. 394; *Hamar v. Knowles*, 6 H. & N. 454. "Case is the proper form of action for injuries done to the surface owner by the acts of the mine owner in not leaving sufficient support." *Harris v. Byding*, 5 M. & W. 60; M. M. D. 357.

<sup>2</sup> *Hunt v. Peake*, 1 Johnson (Eng.), 705; *Farrand v. Marshall*, 21 Barb. 409.

<sup>3</sup> *Caledonian R. R. Co. v. Sprat*, 2 MacQueen, S. C. App. 449; *Caledonian Co. v. Belhaven*, *Id.* 56.

<sup>4</sup> *Caledonian Co. v. Belhaven*, *supra*.

<sup>5</sup> *Elliott v. N. E. Ry. Co.*, 7 H. L. Cas. 388.

<sup>6</sup> *Elliott v. N. E. Co.*, *supra*; *North-Eastern R. R. Co. v. Elliott*, 30 L. J. Ch. 160; 32 *Id.* 403. "A railway act providing for the purchase of lands for railroad purposes, with reservation of the minerals to the owner of the lands so purchased, must be construed to give both lateral and vertical support, although the sale to the railway was compulsory, and an injunction was awarded to restrain the working of minerals of great value underneath in any such manner as to occasion damage to the railroad." *Northeastern R. R. Co. v. Crossland*, 32 L. J. Ch. 353; affirming *s. c.* 2 Jo. & H. 565; M. M. D. 306. "A railroad company was empowered by special act to take lands, the act providing for compensation to parties owning mines interfered with. The owner of the surface, subsequently, by private sale, without regard to the act, sold the land adjoining his mine to the railroad, reserving the minerals. Afterwards, upon attempting to extend his mine underneath



legislature — provides for the acquisition of the right of way over mining land, upon condition of its buying the mine, and it fails to pay the mine owner therefor, he is held to possess his property intact, without regard to the railroad company's surface possession, and it would not only have to pay the original compensation, but damages to the mine owner as well.<sup>1</sup>

§ 218. **Same — Hydrostatic pressure.** — Where the surface is in part supported by the pressure of a water body, such hydrostatic force would be recognized as a necessary factor to the enjoyment of his property rights by the surface owner and a removal of such water body by the subjacent owner would be prevented if likely to result in a subsidence of the surface.<sup>2</sup> But the owner of land through which an underground water-course flows, has no vested right in such water; an adjacent owner can mine his land

the surface sold, it was found that the railroad interfered with its extension in that direction. But there being no reservation or provision for such inconvenience at the time of the sale of the surface, it was held, that the owner of the mine was not entitled to damages, and was bound so to work as not to interfere with the road." *Rex v. Leeds & Selby R. W. Co.*, 3 A & E. 686; M. M. D. 306.

<sup>1</sup> *Bagnall v. London & N. W. R. Co.*, 1 H. & C. 544; affirming 7 H. & N. 723. Although a railroad company has but an easement of right of way, a mine owner will be enjoined, who mines in such a manner as to cause the railroad to subside. *C. & A. R. R. Co. v. Brandon*, 81 Mo. App. 1. Where title to railroad right of way is acquired by condemnation proceedings, the title to such of the mineral as is necessary to be excavated for the roadbed is in the railroad, but the mineral below the grade remains in the landowner. *Evans v. Haefner*, a strong opinion, by Judge Scott, 29 Mo. 141. Railroad gets only such title to mineral as is necessary to support the surface. *Searle v. L. & B. Co.*, 33 Pa. St. 57; 5 M. M. R. 353.

<sup>2</sup> *Elliott v. N. E. Ry. Co.*, 7 H. L. Cas. 333; *N. E. Ry. Co. v. Elliott*, 30 L. J. Ch. 160; s. c. 32 *Id.* 402; 7 H. L. Cas. 333; *Elwell v. Crowther*, 31 Beav. 163.

in the usual way, and if in so doing he drains away the water from his neighbor, the latter is without remedy.<sup>1</sup>

§ 219. **Right of way — Incident to right to mine.** — A grant of the right to take mineral or rock from the land of a mine or quarry owner, implies the right to carry the mineral or stone across such land.<sup>2</sup> It is not necessary that the most direct way be established,<sup>3</sup> but only that a reasonably direct route be followed, or one that a reasonably prudent person might have constructed over his own land.<sup>4</sup> If a right of way is granted for a specific purpose, however, as for agricultural purposes, it could not rightfully be used for other purposes, such as the carriage of minerals.<sup>5</sup> A way should not be constructed for purposes of mere malice, and, if it is, the landowner can maintain an action for damages.<sup>6</sup>

<sup>1</sup> *Acton v. Blundell*, 12 M. & W. 824; Bl. & Weeks Ld. Cas. 758.

<sup>2</sup> *Clark v. R. R. Co.*, 28 Vt. 108.

<sup>3</sup> *Richards v. Richards*, 1 Johnson (Eng.), 255.

<sup>4</sup> *Abson v. Fenton*, 1 B. & C. 195.

<sup>5</sup> *Cowling v. Higginson*, 4 M. & W. 245. *Stafford v. Coyney*, 7 B. & C. 257. "A purchaser of land takes the same subject to a right of way thereover by necessity, existing at the time of purchase." *Fairchild v. Stewart*, 89 N. W. 1075. "Where the description of a right of way is indefinite, the exercise of the easement in a particular manner with the consent of the grantor renders it fixed and certain." *Davis v. Watson*, 89 Mo. App. 15.

<sup>6</sup> *Bayfield v. Parker*, 18 East, 200. "The right of possession of a reasonable amount of surface ground is necessarily implied in the lease of an oil well." *Karus v. Tanner*, 66 Pa. St. 297; M. M. D. 198. The following cases recognize the right of the mineral owner to reasonable use of surface. *Rowbotham v. Wilson*, 8 H. L. Ca. 348; *Wardell v. Watson*, 98 Mo. 107; *Chartlers Coal Co. v. Mellon*, 152 Pa. St. 286; *Lynch v. Coviglio*, 17 Utah, 106; 20 Am. & Eng. Enc. Law (2 Ed.), 775 *et sub.* The extent of surface necessary is question of fact for jury. *Williams v. Gibson*, 84 Ala. 228. As to right of owner of way to break down barrier, see *McEwan v. Baker*, 89 Ill. App. 271. And for measure of damage for injury to right, see *Fleming v. B. & C. Co.* (W. Va., 1902); 41 S. E. Rep. 168.

§ 220. **Private right of way.** — A right of way is said to be private when the right exists in favor of one or more private individuals, and is appurtenant to an estate owned by them, authorizing them to pass over the land of another in pursuit of some specific, or a general object.<sup>1</sup> Such an easement may either be created by express grant, by prescription, or implied from circumstances surrounding the estate granted.<sup>2</sup> But a way acquired for a particular purpose will not be extended so as to authorize the right to use the same for any other purpose, and an appropriation of the land for any other than the purpose for which the easement was acquired would render the owner of the dominant estate liable for damages to the owner of the servient estate, whether the burden on the servient estate had been materially increased or not.<sup>3</sup>

§ 221. **Same — Way of necessity.** — A way of necessity exists where the land granted is completely environed by land of the grantor, or partially by his land and the land of strangers.<sup>4</sup> The law implies from these facts that a right of way over the grantor's land was granted to the grantee, as appurtenant to the estate.<sup>5</sup> But whether such a necessity exists, as will create by implication a right of way, is a question of fact to be determined by the circumstances of each particular case, and mere inconvenience

<sup>1</sup> Tiedeman Real Prop., §§ 607-608.

<sup>2</sup> *Ante, idem*, and cases cited.

<sup>3</sup> *Bremton v. Hall*, 1 Gale & D. 207; *Cowling v. Higginson*, 4 Mees. & W. 245; *Ballard v. Tyson*, 1 Taunt. 279; *Allan v. Gourme*, 11 A. & E. 759; *French v. Marstin*, 24 N. H. 440; *Kirkham v. Sharp*, 1 Whart. 323. "The 'reservation' (so called) of a right of way and carriage of minerals in an indenture of lease, is an easement created by grant of the lessee." *Durham & S. R. Co. v. Walker*, 2 Q. B. 940; *s. c.* 2 G. & D. 326; *M. M. D.* 85.

<sup>4</sup> Tiedeman on Real Prop., § 609.

<sup>5</sup> *Ante, idem*, and cases cited.

will not constitute such necessity.<sup>1</sup> And it has been held that it must be a strict necessity,<sup>2</sup> and although excessive expense in procuring another way would be such a necessity,<sup>3</sup> when a new way is acquired, since the existence of the necessity has then expired, the easement raised from the necessity would also expire with the cessation of the necessity.<sup>4</sup>

§ 222. **Same — Who must repair the way.**—In the absence of an express agreement, the grantee of a right of way must keep the same in repair and if he fails to do so, he has no right to appropriate other adjacent land of the servient estate because the way has become impassable.<sup>5</sup> But the obligation to repair may by covenant be imposed upon the owner of the servient estate, and, in such case, if the latter violates his agreement, the grantee of the way may, if it is necessary, pass over the adjoining land of the servient estate.<sup>6</sup>

§ 223. **Public right of way.**—Rights of this character are enjoyed by the public generally. Reference is here had

<sup>1</sup> *Ramirez v. McCormick*, 4 Cal. 245; *Ogden v. Grave*, 38 Pa. St. 487; *Screven v. Gregory*, 8 Rich. 158.

<sup>2</sup> *McDonald v. Lindell*, 8 Rawle, 492; *Bartlett v. Prescott*, 41 N. H. 498; *O'Rourke v. Smith*, 11 R. I. 259.

<sup>3</sup> *Pettingall v. Porter*, 8 Allen, 1; *Corbrey v. Wilson*, 7 Allen, 864; *Johnson v. Jordon*, 2 Metc. 284; *Brigham v. Smith*, 4 Gray, 397; *Plimpton v. Converse*, 42 Vt. 712.

<sup>4</sup> *Ante, idem*; *Baker v. Crosby*, 9 Gray, 421; 14 Gray, 126; *Pierce v. Selleck*, 18 Conn. 821; *Wissler v. Hershey*, 28 Pa. St. 838. A way of necessity will not arise by implication, where the mineral is but conjectural and the grant thereof also provides the means of removal. *Bascom v. Cannon*, 158 Pa. St. 225; 27 Atl. Rep. 968.

<sup>5</sup> *Tiedeman on Real Prop.*, § 610, and cases cited.

<sup>6</sup> *Pomfret v. Ricord*, 1 Saund. 323; *Hamilton v. White*, 5 N. Y. 9; *Jones v. Percival*, 5 Pick. 485; *Doone v. Badger*, 12 Mass. 65; *Rider v. Smith*, 3 T. R. 766; *Bullard v. Harrison*, 4 M. & S. 387.

to cases where the land over which the highway extends, belongs to the owners of contiguous property and not to those cases where the highway is vested in the State or municipality in fee, for in such case no question in respect to easements could arise.<sup>1</sup> Such easements are acquired by dedication and by appropriation.<sup>2</sup> A dedication may arise from any acts of the owner showing an intention to dedicate,<sup>3</sup> or be applied by custom,<sup>4</sup> from long user by the public. A formal acceptance of the easement is not necessary and acceptance may be inferred from a continued use in conformity with the dedication.<sup>5</sup>

§ 224. **Right to cut timber on government land.** — The Federal statute gives the party holding a mining claim, or an occupant of mineral land, which is not subject to entry under the existing laws of the United States, the right to fell and remove such timber as may be necessary to the full enjoyment of his right to mine.<sup>6</sup> But this does not author-

<sup>1</sup> Tiedeman Real Prop., §§ 607-611 and cases cited.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> Haynes v. Thomas, 7 Ind. 88; Tricker v. Schlader, 52 Ill. 78; Buchanan v. Curtis, 25 Wis. 99.

<sup>4</sup> Parish v. Stevens, 1 Oreg. 59; Lemon v. Hayden, 13 Miss. 159; Lewiston v. Proctor, 27 Ill. 214.

<sup>5</sup> Muzzey v. Davis, 54 Me. 361; Cole v. Sprawle, 35 Me. 161; Stevens v. Nashua, 46 N. H. 192; Curtis v. Hoyt, 19 Conn. 154; Pickett v. Brown, 18 La. An. 560. Strictly speaking, this right is not an easement but rather an incorporeal hereditament in the nature of an easement. Tiedeman Real. Prop., § 611; note on page 478.

<sup>6</sup> See Act of June 8, 1878, U. S. Statutes. "The above act in connection with the acts of March 3, 1891 (26 St. L. 1098) and February 13, 1898 (27 St. L. 444), are the acts now in force controlling the rights to cut timber in the mining States and Territories, except Alaska. They are construed by Circulars of the Land Department, dated respectively January 18th and February 10th, 1900." 29 L. D. 571, 572. See U. S. v. Copper Queen Co., 60 Pac. 885; U. S. v. Lynde, 47 Fed. 297; Mor. Min. Rts. (10 Ed.) 449.

ize a party holding such a claim to cut and remove the timber for purposes of speculation, and although he can dispose of it as he sees fit, whenever the timber was removed for the purpose of facilitating his mining operations, he is not entitled to the growing timber for any other than mining purposes,<sup>1</sup> and he will not be permitted to remove and sell the timber, several acres in advance of his mining operations, for this would permit the numerous adventurers to strip the public land of its valuable timber, under the pretense of developing a mining claim, with no other object than to secure the timber for speculative purposes.<sup>2</sup>

§ 225. **Timber rights on private lands.** — A lease of land for mining purposes does not carry with it the right to cut timber on the land, for use in such operations,<sup>3</sup> as the property in the mineral and the timber are of separate distinct species and the one could not, by analogy, be said to accompany a grant of the other. A grant of the right to cut timber on the land demised, for mining purposes, would be recognized as vesting in the lessee, however, a right to cut such timber as would be reasonably necessary for the mining operations,<sup>4</sup> and even in the absence of such a grant, the lessee could cut and remove out of the way, such timber as was necessary to be removed to enable him to exercise the power to get the mineral or stone, and this

<sup>1</sup> See Act of Mar. 2, 1891, R. S. U. S.; *Rogers v. Soggs*, 22 Cal. 444; B. & W. L. C. 170-171; *Cotton v. U. S.* (11 How. 229) where it was held the government could maintain trespass against one cutting the public timber.

<sup>2</sup> *Rogers v. Soggs*, *supra*; B. & W. L. C., pp. 170-71, 819. As to what will amount to waste on private lands, see chapter on Waste; also B. & W. L. C., p. 819.

<sup>3</sup> *Dorcey v. Askwith*, Hob. 234; s. c. Hutt. 19.

<sup>4</sup> *Snodgrass v. Ward*, 8 Haywood (Tenn.), 40.

would not be held to be a breach of covenant on his part.<sup>1</sup>

§ 226. **Easements in water-courses.**— The various rights so far mentioned, in water-courses, are natural rights, acquired by usage, or implied or established by law. They exist independent of any contract or grant. But such rights may be either enlarged, diminished, or altogether extinguished by means of an express grant,<sup>2</sup> in the same manner as the creation of express and special easements affect the right of property in other cases. Where special rights are acquired in a stream of water by grant, the owner of the dominant estate, or grantee, has no right to make such use of the water as will inflict greater injury upon the other riparian owners than is expressly permitted by the terms of the grant. And the rights acquired by appropriation cannot in the same way be enlarged or extended.<sup>3</sup> The right of a water-course over another's land places upon the holder of such easement the duty of keeping the water way in repair in the absence of a covenant imposing such obligation on the owner of the land, and for that purpose he has the right to enter upon the land and make repairs, taking care that no unnecessary damage results to the servient estate.<sup>4</sup>

<sup>1</sup> *Doe v. Price*, 8 C. B. 894.

<sup>2</sup> *Manning v. Mosdale*, 5 A. & E. 750; *Stockport Water Works v. Potter*, 3 H. & C. 300; *Dudley Canal v. Grazebrook*, 1 B. & Ald. 59; *Goldsmith v. Tunbridge Wells Com.*, L. R. 1 Ch. 349; *Cook v. Hull*, 3 Pick. 269; *Stowell v. Lincoln*, 11 Gray, 434; *Watkins v. Peck*, 13 N. H. 360.

<sup>3</sup> *Sampson v. Hodinott*, 1 C. B. (N. s.) 590; *Bickett v. Morris*, L. R. 1 H. L. Cas. 47; *Northern v. Hurley*, 1 E. & B. 665; *Embrey v. Owen*, 6 Exch. 353; *Jennison v. Walker*, 11 Gray, 423.

<sup>4</sup> *Peter v. Daniel*, C. B. 568; *Prescott v. White*, 21 Pick. 341. As to the property and rights in water, both upon public and private land, see the chapter following. After the acquisition of a water right under statute (R. S. U. S., Sec. 2339), the subsequent locator of a mining claim takes

§ 227. **Legalized nuisances.** — Where one acquires from the owner of land by grant or prescription, the right to do things which without such license would be a nuisance and for which an action would lie, he is said to have acquired an easement in the land to commit the nuisance, free from liability for the consequences. Such is very often the case with mining and other noisome and offensive trades.<sup>1</sup> But before an easement of this character can be acquired, the trade to be carried on must be conducted in a lawful manner, and likely to be productive of benefit to the public, and a nuisance, which has become legalized in this manner, must be kept strictly within the conditions upon which the right was acquired. The licensee will not be permitted to increase the nuisance, or to establish a new one in its place, and the right must be exercised with the least possible discomfort or annoyance to the owners of the adjoining lands.<sup>2</sup>

subject to the water easement. *Broder v. Natoma Water Co.*, 101 U. S. 274; *Jacob v. Lorenz*, 98 Cal. 332; *Jacob v. Day*, 111 Cal. 571; *Barnes v. Sabron*, 10 Nev. 217; 20 Am. & Eng. Enc. Law (2d Ed.), 760 *et sub.*

<sup>1</sup> Tiedeman R. P. 622, and cases. For damage from deposit of refuse of quartz mill upon adjoining land, see *Montana Co. v. Gehring*, 75 Fed. Rep. 384

<sup>2</sup> *St. Helens Smelting Company v. Tipping*, 11 H. L. Cas. 642; *Dana v. Valentine*, 5 Metc. 8; *Atwater v. Bodfish*, 11 Gray, 152; *Holeman v. Boiling Sp. Co.*, 14 N. J. Eq. 346; *Aldred's Case*, 9 Rep. 59a; *Cole v. Barlow*, 4 C. & B. (N. S.) 434; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bower v. Hill*, 7b. 339.



## CHAPTER XV.

### PROPERTY IN WATER AND WATER COURSES.

- SECTION 228.** Common law inapplicable.  
229. Right based on prior appropriation.  
230. What will constitute an appropriation.  
231. Limitation on the right.  
232. Right to running water.  
233. How the right is acquired.  
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236. Fouling water with refuse matter.  
237. Right to divert water.  
238. Sale and transfer of water right.  
239. Subterranean streams — No easement in.  
240. As to percolations.  
241. Artificial water-courses.

§ 228. **Common law inapplicable.**—The doctrine of the common law, declaratory of the rights of riparian proprietors respecting the use of running water, applies only to a limited extent to the necessities of the miners of the Western States and Territories, and would be entirely inadequate to their protection.<sup>1</sup> By the common law the riparian owner on a non-navigable stream took the land to the middle thread of the stream, and had the right to use the water flowing over the land as an incident to his estate.<sup>2</sup> All the owners on the same stream had an equality of right to the use of the water, as it naturally flowed in quality, and without diminution, except for

<sup>1</sup> *Atchison v. Peterson* (a leading case), 20 Wall. 507; B. & W. L. C., p. 730; *Irwin v. Phillipps*, 5 Cal. 140.

<sup>2</sup> 3 Kent's Com. 439 (side paging); *Tyler v. Wilkinson*, 4 Mason, 397; *Wright v. Howard*, 1 En. Ch. Rep. 190; Bl. Com. Bk. 2, p. 17; *Westen v. Alden*, 8 Mass. 136; *Norton v. Valentine*, 14 Vt. 239; *Arnold v. Foot*, 12 Wend. 330; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 375.

a reasonable use and one owner could not divert the water from the owner next below him or retard it in its flow to the injury of the owner above him.<sup>1</sup> No property could be acquired in the water itself, any more than in the air, but simply a right to its use. No proprietor had the right to use the water to the prejudice of any other proprietor, either above or below him, unless he had acquired a prior right to possess it by an adverse use for the statutory period,<sup>2</sup> or a title to some exclusive enjoyment; but when the water left his estate, unless he had the consent of the other proprietors to divert or diminish the quantity of water, he was compelled to return it to its ordinary channel.<sup>3</sup>

<sup>1</sup> *Ante, idem.* "The doctrine of riparian rights does not prevail in Nevada." *Walsh v. Wallace*, 67 Pac. Rep. 914. (Nev. 1902).

<sup>2</sup> *Prescott v. Phillips*, cited in *Bealey v. Shaw*, 6 East, 218; *Mason v. Hill*, 5 B. & Adol. 25; 2 Nev. & M. 747; *Angell on Water-courses*, 210-223; *Whetstone v. Bowser*, 29 Pa. St. 59; 45 *Id.* 521; *Ogburn v. Conner*, 46 Cal. 346; *Collier on Mines*, 69; *Saunders v. Newman*, 1 B. & A. 258; *Williams v. Moreland*, 2 B. & Cr. 910; *Bainbridge on Mines*, p. 84; *Gale Easements*, 140; *Blanchard & Weeks Ld. Cases*, p. 720 *et sub.*

<sup>3</sup> 3 Kent's Com., slide page 489 and cases cited. "A stream is parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee." *Union M. & M. Co. v. Ferris*, 2 Saw. C. C. 176; M. M. D. 404. "A prior appropriator of water in a river acquires no right to the corpus of the water until such appropriator has conducted it into his canal for use." *Salt Lake City v. Salt Lake City Water & Electrical Power Co.*, 67 Pac. Rep. 672. (Utah, 1902). The Government statute is as follows: § 2339. "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified, is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or

§ 229. **Right based on prior appropriation.** — At an early day after the discovery of gold in California, it was found that the common law doctrine of riparian ownership was inadequate to protect the rights of the miner in the use of water for mining purposes. The equality of right among the different proprietors of the same stream was incompatible with an extended diversion of the water by one proprietor and its conveyance for mining purposes to points where it could not be restored to the stream.<sup>1</sup> There was no reason for the application of the common law rule respecting the rights of equality in the use of the water by the different proprietors, for the government was itself the sole proprietor of all the public land, whether bordering on the streams or not, and it had, by its silent acquiescence, assented to the occupation and enjoyment of such land for mining purposes, with a free

damage.' (Act of Congress, July 26, 1866, Ch. 262, § 9.) § 2340. "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." (Act of Congress, July 9, 1870, Ch. 235, § 17.)

<sup>1</sup> Blanchard and Weeks *Leading Cases on Mines, Minerals and Mining Water Rights*, p. 788. "The general doctrine, and the cases by which it was first enunciated, are as follows: The first appropriation of the water of a stream passing through public lands of the United States, for some beneficial purpose, confers the right to the use and enjoyment of the water to the extent of the original appropriation." (*Irwin v. Phillips*, 5 Cal. 140; *Hoffman v. Stone*, 7 Cal. 49; *Bear River Co. v. York Mining Co.*, 8 Cal. 332; *Butte Canal Co. v. Vaughn*, 11 Cal. 152; *McDonald v. Bear River Co.*, 13 Cal. 220; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Hill v. Smith*, 27 Cal. 476; *Smith v. O'Hara*, 43 Cal. 371; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534; *Hobart v. Ford*, 6 Nev. 80; *Proctor v. Jennings*, 6 Nev. 83; *Dalton v. Bowker*, 8 Nev. 201; *Barnes v. Sabron*, 10 Nev. 217; *Atchison v. Peterson*, 20 Wall. [U. S.] 507; *Basey v. Gallagher*, 20 Wall. [U. S.] 670; *Columbia Mining Co. v. Holter*, 1 Montana R. 296,) all cited by Blanchard & Weeks, *supra*.

and unlimited use of the water for that purpose.<sup>1</sup> Hence it was, that rules and customs grew up in recognition of the right of the prior appropriator to the use of running water, the same as the locator's prerogatives, based upon the fact of prior discovery, and being assented to by the government, this right finally came to be so thoroughly recognized by the people at large in the mining regions that the courts confirmed and enforced the right, although there had been no specific legislation on the subject, in the same manner as if the right had been vested by the most distinct expression of the will of the lawmakers.<sup>2</sup>

§ 230. **What will constitute an appropriation.**—The acts necessary to constitute an appropriation of the right to divert a water-course upon the public land and the various purposes for which an appropriation could be made, has been the subject of specific legislation in the different Western States.<sup>3</sup> Generally speaking, the right to divert

<sup>1</sup> *Atchison v. Peterson*, 20 Wall. 507.

<sup>2</sup> *Irwin v. Phillips*, 5 Cal. 140, where the court, in speaking of these rules and customs, said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial work have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests in the mineral region would remain without development." *Blanchard & Weeks Leading Cases*, p. 735. See also *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143; *Ortman v. Dixon*, 13 Cal. 83; *Laddell v. Simpson*, 2 Nev. 274; *Hill v. Smith*, 27 Cal. 483; *Yale on Min. Claims & Water Rights*, 194, cited by *Blanchard & Weeks, supra*.

<sup>3</sup> Statutes different States. "As between two locators of public land the rule *qui prior est in tempore potior est in jure* must always apply."

the streams of water upon the public domain and the privilege of working the mines, are upon an equal footing, and the same good faith would be required in the one case, that would be necessary to constitute a *bona fide* appropriation in the other.<sup>1</sup> A mere pretense of working upon a ditch or reservoir, in order to enforce a claim to the water of a particular stream and to deter others from making a useful appropriation of the same, could not amount to an appropriation of the water of such stream for any purpose.<sup>2</sup> The object of the statutes of the different States is to prevent the locking up of useful streams of water by those whose claims exceed their ability to utilize their pretended appropriations, and the appropriation must be for some useful purpose and by actual possession and occupancy, mere constructive possession not being sufficient to support the right.<sup>3</sup>

*Crandall v. Woods*, 8 Cal. 186; M. M. D. 401. See *Hall v. Blackman*, 68 Pac. Rep. 19. As to appropriation by placer claimant, see *Schwab v. Beam*, 86 Fed. Rep. 41.

<sup>1</sup> *Irwin v. Philipps*, 5 Cal. 140; *Atchison v. Peterson*, 20 Wall. 507; *Blanchard & Week Leading Cases*, 727-730; *Ophir Co. v. Carpenter*, 4 Nev. 534; *Vansickle v. Haines*, 7 Nev. 249. "Possession or actual appropriation must be the test of priority in all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows." *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Kimball v. Gearhart*, 12 *Id.* 28; M. M. D. 402. See *Greer v. Helser*, 16 Colo. 306; *Jacob v. Lorens*, 33 Pac. Rep. 120; *Tynan v. Desplain*, 22 Colo. 240.

<sup>2</sup> *Nevada Co. & Soc. Co. v. Kidd*, 37 Cal. 314; *Barnes v. Sobron*, 11 Nev. 217; *Caruthers v. Pemberton*, 1 Mont. 111; *Broder v. Natoma Water & Min. Co.*, 50 Cal. 621; *Blanchard & Weeks Leading Cases*, pp. 739-740.

<sup>3</sup> *Blanchard & Weeks Leading Cases*, pp. 735-739; *Atchison v. Peterson*, 20 Wall. 507; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *McKinney v. Smith*, 21 Cal. 374; *Kimball v. Gearhart*, 12 Cal. 27. "The right of the appropriator of water is usufructuary, is not in the corpus of the water, and continues only with its possession." *Eddy v. Simpson*, 3 Cal. 249; M. M. D. 402. "Running water, so long as it continues to flow in its natural course, is

§ 231. **Limitation on the right.** — The first appropriator of water on the public land has the right to insist upon an undisturbed use and enjoyment of the water for the purposes and to the extent of his original appropriation, and in case the quality of the water is impaired or the quantity diminished, he can maintain an action for an appropriate remedy for the injury he has sustained.<sup>1</sup> What diminution of quantity or deterioration in quality, however, will constitute an invasion of the rights of the first appropriator, must depend largely upon the circumstances of each particular case, considered with reference to the uses to which the water is applied.<sup>2</sup> A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not impair its value for mining or irrigation. Hence, in all controversies between the prior appropriator

not the subject of private ownership; but a right may be acquired to its use which will be regarded and protected as property." *Kidd v. Laird*, 15 Cal. 163; M. M. D. 402. "The foundation of a right to water is the first possession." *Eddy v. Simpson*, 3 Cal. 249; M. M. D. 402.

<sup>1</sup> *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143. "But whether upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction." *Atchison v. Peterson*, 20 Wall. 507; B. & W. L. C., p. 737.

<sup>2</sup> *Hill v. Smith*, 27 Cal. 483; *Yale Min. Claims & Water Rights*, 194; *Navada Water Co. v. Powell*, 34 Cal. 109; *Moeris v. Bickwell*, 7 Cal. 261; *Davis v. Gale*, 32 Cal. 26; *Wilson v. New Bedford*, 108 Mass. 261. "No use of water by a riparian owner can give him rights by adverse user as against an upper owner." *Walker v. Lillingston*, 70 Pac. Rep. 282 (Cal. 1902). "Appropriators of the waters of a stream have priority of rights in their chronological order of appropriation, the later appropriator being limited to rights not interfering with those of the earlier appropriator." *McCall v. Porter*, 70 Pac. Rep. 820 (Or. 1902).

and parties subsequently claiming the water, the question to be decided is whether his use and enjoyment of the water for the purposes of the original appropriation have been impaired by the acts of the defendant,<sup>1</sup> and if the appropriator has changed the original use of the water, prior to the injury complained of, this would prevent his recovery in such an action.<sup>2</sup> But the appropriation does not confer upon the appropriator an absolute right to the body of water diverted, so that he can, after its diversion, run it to waste and prevent others from using it for mining and other legitimate purposes, nor would the appropriation confer upon him such rights that he could insist upon the flow of the water without deterioration in quality, where such deterioration would not defeat or impair the original uses to which the water had been applied.<sup>3</sup> And in subor-

<sup>1</sup> *Ortman v. Dixon*, 13 Cal. 33; *Lobdell v. Simpson*, 2 Nev. 274; *Yale M. C. & W. R.* 194; *Hill v. Smith*, 27 Cal. 483. "One mine has no right to collect surface water and let it into a mine below." *Horner v. Watson*, 14 M. M. R. 1; *Mor. Min. Rts.* (10 Ed.), p. 164.

<sup>2</sup> *Blanchard & Weeks Leading Cases*, p. 741. "Whether the original use of the water has been changed to the injury of another is a question of fact for the jury to determine. (*Nevada Water Co. v. Powell*, 34 Cal. 109. See, also, *Maeris v. Bicknell*, 7 Cal. 261; *Hill v. Smith*, 27 Cal. 476; *Davis v. Gale*, 32 Cal. 26.) In the last mentioned case, in speaking of the right of the appropriator to change the use of the water, Mr. Justice Sanderson said (page 84): 'Appropriation, use and non-use are the tests of his right; and the place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated, at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water-rights and privileges.' In that case, the learned justice comments on, and denies the soundness of *McKinney v. Smith*, 21 Cal. 383, in which Mr. Justice Norton intimated that an appropriator could not change his use of the water from one purpose to another without losing his priority." *B. & W. L. C.*, *supra*

<sup>3</sup> *Phoenix Co. v. Fletcher*, 23 Cal. 481; *Hill v. Smith*, 27 *Id.* 483; *Kidd*

dination to the rights of the prior appropriator, subsequent appropriators may use the channel and waters of the stream and mingle with it other waters, and divert it as often as they please.<sup>1</sup>

§ 232. **Right to running water.**—At common law, the riparian owners of a stream of running water held mutual easements, each upon the other's soil, for the free and unrestricted flow of the water.<sup>2</sup> The riparian owner could use the water to a reasonable extent, but he could not divert the water, diminish the flow, corrupt the water or dam it up.<sup>3</sup> At an early day the courts recognized the inadequacy of this doctrine to easements and rights pertaining to mining districts, and the right to prescribe rules suitable to govern in such cases, was

*v. Laird*, 15 *Id.* 180; *Davis v. Gale*, 32 Cal. 26; *McKinney v. Smith*, 21 Cal. 374; *Union Water Co. v. Crary*, 25 Cal. 504.

<sup>1</sup> 11 Cal. 162; 28 *Id.* 488, and *Hill v. Smith*, *supra*. "Anybody else may divert and use all the water, be it more or less, that a prior claimant is not in a present condition to use, and by lack of diligence, on his part, in pursuing and perfecting a prior inchoate right, may acquire rights even superior to his. (37 Cal. 314. See, also, *Kimball v. Gearhart*, 12 Cal. 27; *Thompson v. Lee*, 8 Cal. 275; 6 Cal. 105; *McKinney v. Smith*, 21 Cal. 374.) If A. erects a mill on a running stream, this shows an appropriation of the water for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. (13 Cal. 38. See, also, *Nevada Water Co. v. Powell*, 34 Cal. 109; *White v. Todd's Valley Water Co.*, 8 Cal. 443; *Burnett v. Whitesides*, 15 Cal. 85; *Higgins v. Barker*, 42 Cal. 233; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Woolman v. Garringer*, 1 Montana, 535.) But a claimant of water who has a right to divert it into his ditch may not, because the bed of the river has been raised by deposit from mines above, so raise his dam as to injure another." (*Nevada Water Co. v. Powell*, 34 Cal. 109. See *Proctor v. Jennings*, 6 Nevada, 83.) *B. & W. L. C. 741 et sub.*

<sup>2</sup> *Tiedeman on R. P.*, § 614.

<sup>3</sup> *Washburn v. Gilman*, 64 Me. 163; *Richmond Mfg. Co. v. Atl. DeLaine Co.*, 10 R. I. 106; *Jacobs v. Allord*, 42 Vt. 303.



delegated by the Federal government to the local legislatures of the mining districts.<sup>1</sup> The object of the statute was to protect the rights and easements of private individuals pertaining to land which still belonged to the general government, and while a person could not, under the statute, acquire, by local rule or custom, the right to divert a stream of running water as against the lawful owner of the fee;<sup>2</sup> as to land that had yet been unpatented, the person who first appropriated the waters of a running stream to a beneficial purpose could hold the same against any subsequent claimant, either above or below, and was under no legal obligation to restore the water to its channel.<sup>3</sup>

<sup>1</sup> R. S. U. S. 79, § 2338; Wade Am. Min. Laws, pp. 77-78. "The right to water must be treated in this State as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personalty." *Hill v. Newman*, 5 Cal. 445; M. M. D. 401. "The right to the use of a water-course in the public mineral lands, and the right to divert and use the water taken therefrom, may be held, granted, abandoned or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him." *Yankee Jim's U. W. Co. v. Crary*, 25 Cal. 504; M. M. D. 402.

<sup>2</sup> Wade Am. Min. Laws, 78-79; *United States v. Hughes*, 11 How. 568; *Dias v. Tuller*, 12 Vt. 190; *Gibson v. Chouteau*, 18 Wall. 92; *Pope v. Kimmon*, 54 Cal. 3.

<sup>3</sup> *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *Atchison v. Peterson*, 1 Mont. 561; *Irwin v. Phillips*, 5 Cal. 140 (a leading case, cited B. & W. L. C., p. 727). The U. S. Statute only confirms such easements as may have been acquired on unpatented land. Wade Am. Min. Laws, p. 80. But to vest a prior appropriator with the right to use and divert running water, the appropriation must be for a useful purpose and the appropriator be in actual as contradistinguished from the constructive possession of the right. *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *McKinney v. Smith*, 21 Cal. 374.

§ 233. **How the right is acquired.** — The right to use running water on land belonging to the government can only be acquired by appropriation or by purchase.<sup>1</sup> By appropriation is meant the use or possession of the water for purposes that are necessary or beneficial to the claimant.<sup>2</sup> No one can appropriate running water on the public land for purposes of speculation merely, and the water should be used on land occupied by the appropriator, and he can only claim as much as he can put to a reasonable use.<sup>3</sup> Any appropriation of the surplus water would be equally good as against other subsequent claimants. Purchase is the transfer, for a consideration, by the appropriator, of his right to use the water.<sup>4</sup> In some of the States the right to running water can only be transferred by deed, as real estate,<sup>5</sup> but in the States where this rule obtains a defective transfer has the effect of an abandonment by the grantor, and a reappropriation by the grantee, provided there is a *bona fide* delivery of possession.<sup>6</sup>

§ 234. **How the right is perfected.** — The right to use running water on public land may be established and preserved in any one of the three following ways: (1) By proof that the claimant exercised the right by virtue of

<sup>1</sup> Wade's Am. Min. Laws, p. 82, § 54.

<sup>2</sup> *Atchison v. Peterson*, 20 Wall. 507; *s. c.* B. & W. L. C. 730-738; *Hill v. Smith*, 27 Cal. 483.

<sup>3</sup> Wade Am. Min. Laws, *supra*.

<sup>4</sup> See definition of Title by Purchase. *Tiedeman R. P.*, §§ 659-660.

<sup>5</sup> This is the rule in Montana. *Barkley v. Tieleke*, 2 Mont. 59; Wade Am. Min. Laws, pp. 80-83. "Right to water appropriated may be transferred like other property. A ditch is real estate and is conveyed by deed. (*Smith v. O'Hara*, 1 M. R. 671; *Bradley v. Harkness*, 11 M. R. 389; *Burnham v. Freeman*, 11 Colo. 601; Colorado Act, 1893, p. 298.)" *Mor. Min. Rts.* (10 Ed.) 167.

<sup>6</sup> *Barkley v. Tieleke*, *supra*. See *Welch v. Garrett*, 51 Pac. Rep. 405; *New Co. v. Armstrong*, 21 Colo. 357.

some local custom; (2) under authority given by the State legislature; (3) that his right has been recognized by some judicial decision.<sup>1</sup> If a claimant has obtained his right by virtue of either a statutory enactment, a recognition by the courts, or under some local custom, it will be preserved inviolate by the courts;<sup>2</sup> but where there is a conflict between claimants of the right to running water, the one holding by virtue of some statutory enactment is held to have a better title than the one who holds under some local custom or by reason of a judicial recognition of his right.<sup>3</sup> After the right to use running water is established, however, the appropriator can recover damages from one who subsequently appropriates the water of the same stream, if, in so doing, such appropriator infringes on his easement.<sup>4</sup> But damages can seldom be recovered for a reasonable use of the water, for the injury would be so small, if any at all existed, that it would be regarded by the courts as *damnum absque injuria*.<sup>5</sup>

§ 235. **How right is lost.** — The right to running water may be lost either by abandonment or divested by adverse possession under the statute of limitations.<sup>6</sup> In order to

<sup>1</sup> *Blanchard & Weeks Ld. Cas.*, pp. 718-788; citing *Basey v. Gallagher*, 20 Wall. 670.

<sup>2</sup> *Wade Am. Min. Laws*, pp. 83-84; *Basey v. Gallagher*, *supra*.

<sup>3</sup> *Basey v. Gallagher*, *supra*; *B. & W. L. C.*, *supra*; *Thorp v. Freed*, 1 Mont. 652; *Wade's Am. Min. Laws*, p. 84.

<sup>4</sup> *Blan. & Weeks Ld. Cas.* 199; *Sims v. Smith*, 7 Cal. 148; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Natoma Water Co. v. McCoy*, 23 *Id.* 490; *Wade Am. Min. Laws*, p. 84; *Elwell v. Crowther*, 81 L. J. (N. S.) Ch. 763; *Hill v. Smith*, 27 Cal. 476; *B. & W. L. C.* 641.

<sup>5</sup> *Blanchard & Weeks Ld. Cas.*, p. 200; *Wixon v. Bear River & Auburn W. & M. Co.*, 24 Cal. 367; *Esmond v. Chew*, 15 Cal. 137; *Wade Am. Min. Laws*, p. 84.

<sup>6</sup> *Dougherty v. Creary*, 30 Cal. 290; *Barkley v. Tieleke*, 2 Mont. 59; *Morrison's Mining Digest*, p. 3; *Atchison v. Peterson*, 1 Mont. 651; *Wade Am. Min. Laws*, p. 84.

constitute an abandonment there must be an actual intent to abandon the right before the claimant can be said to have lost his easement,<sup>1</sup> and the mere fact that he allows the water to flow back into its natural channel, in the absence of such an intent, will not, of itself, operate as an abandonment.<sup>2</sup> And abandonment can never operate to vest the title in another, and whenever it takes effect it can only have the force of destroying the title of the delinquent claimant.<sup>3</sup> But although the title is not transferred by abandonment, it may be lost by estoppel, under the statute of limitations.<sup>4</sup> In order for the title of the real owner to be barred by the statute, however, the possession by the adverse claimant must be continued and uninterrupted, and whether or not the title of the adverse claimant could be lost by abandonment, under the statute of limitations, depends upon the theory entertained by the trial court, regarding the effect of the statute upon the title of the adverse claimant.<sup>5</sup>

<sup>1</sup> *Bell v. Bed Rock Co.*, 36 Cal. 214; *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *B. & W. L. C.* 736-738-743. Abandonment is always a question of fact. *Karns v. Tanners*, 66 Pa. St. 297; *Weill v. Lucerne M. Co.*, 11 Nev. 200.

<sup>2</sup> *Butte Canal Co. v. Vaughan*, *supra*; *Jones v. Jackson*, 9 Cal. 287.

<sup>3</sup> *Tiedeman R. P.* 605-739. But when one's title has been lost by abandonment it cannot be afterwards revived to a grantee by means of a sale. *Davis v. Gale*, 32 Cal. 26.

<sup>4</sup> *Tiedeman on R. P.*, *supra*.

<sup>5</sup> *Ante*, *idem*. "A water right, although real estate, may be abandoned. *Barkley v. Tieleke*, 2 Mont. 59. "The doctrine of abandonment only applies where there has been a mere naked possession without title. Where there is a title, to preserve it there need be no continuance of possession, and the abandonment of possession cannot affect the rights held by virtue of the title." *Ferris v. Coover*, 10 Cal. 589. *M. M. D. 3*. "If miners engaged in washing their mining claims with water, abandon the water and tailings which pass from their mining grounds, any other persons have a right to take and appropriate the same to their own use." *Dougherty v. Creary*, 30 Cal. 290; *M. M. D. 3*.

§ 236. **Fouling water with refuse matter.** — The special rights acquired by an appropriation of water, based upon the implied assent of those having the same equality of right,<sup>1</sup> when once they have attached, will be enforced and guarded by the courts, within the limits of the appropriation, although no new rights could be ingrafted on the original appropriation, for any purpose that would aggravate the previous disturbance, or sensibly impair the rights of subsequent appropriators.<sup>2</sup> It is well settled that the right to discharge noxious waters which have been used and retained for the precipitation of minerals, like the right of diversion, may be acquired by appropriation.<sup>3</sup>

Water right is not lost by non-user, without an intent to abandon. *Welch v. Garrett* (Idaho), 51 Pac. Rep. 405.

<sup>1</sup> *Baxendale v. McMurray*, L. R. 2 Ch. 790; *McCullom v. Water Co.*, 54 Pa. St. 40; *Sampson v. Burnside*, 13 N. H. 264; *Babcock v. Utter*, 1 Keyes (N. Y.), 397; s. c. 32 How. 439.

<sup>2</sup> *Brown v. Best*, 1 Wils. 174; *Bealey v. Shaw*, 6 East, 208; *Wood v. Sutcliff*, 2 Sim. (U. S.) 163; *McCullom v. Water Co.*, *supra*.

<sup>3</sup> *Wright v. Williams*, 1 M. & W. 77; *Walt's Act. & Def.* (Vol. 4), p. 428. "A proprietor of land over which a stream of water runs has as against a lower proprietor the use of only so much of the stream as will not materially diminish its quantity or corrupt its quality. His right is not to be measured by the necessities of his business (operating lead mines)." *Wheatley v. Chrisman*, 24 Pa. St. 298; *M. M. D.* 404. See *Schumacher v. Shawhan*, 67 S. W. 717. "As to the deterioration in the quality of the water by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*." *Bear River Co. v. N. Y. M. Co.*, 8 Cal. 327; *M. M. D.* 403. "Any other rule would involve an absolute prohibition of the use of all the water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom." *Id.* Flowing refuse of iron ore into stream so as to render it unfit for agricultural purposes is held actionable in Alabama. *Drake v. Lady Ensley Coal Co.*, 14 So. Rep. 749; 24 L. R. A. 64. See also *Elders v. Likens Valley Coal Co.*, 157 Pa. St. 490; 27 Atl. Rep. 545; *Bailey v. Mill Creek Coal Co.*, 20 Pa. Super. Ct. 186 (Pa. 1902). "In an action for damages for polluting and obstructing a water-course, evidence offered by defendant that plaintiff could procure pure water from another source

And the right to throw refuse matter from mines into a natural stream to be drained away may be asserted either by prescription or by custom.<sup>1</sup> But in the use of the water, as in the construction of their ditches, miners are bound to exercise reasonable care to prevent injury to the rights and property of other appropriators along the same stream,<sup>2</sup> and for injury resulting from wanton carelessness or gross negligence they could be made to respond in damages.<sup>3</sup> The owner of a saw-mill upon a stream, the waters of which are used for mining purposes, under a prior appropriation, would not be permitted unnecessarily to throw sawdust into the stream;<sup>4</sup> nor would an appropriator of the water for mining purposes be permitted to use it so that it would injure orchards and gardens along the stream, which were inclosed or planted before the water was appropriated.<sup>5</sup>

should be rejected." *Stevenson v. Ebervale Coal Co.*, 52 Atl. Rep. 201 (Pa. 1902).

<sup>1</sup> *Carlyon v. Loveling*, 1 Hurl. & N. 784; s. c. 26 L. J. Exch. 251; 40 E. L. & Eq. 448; W. A. & D. (Vol. 4), p. 428.

<sup>2</sup> *Campbell v. Bear River &c. Co.*, 35 Cal. 679; *Angell on Waters*, 380, Sec. 336.

<sup>3</sup> *Tierney v. Miner's Ditch Co.*, 7 Cal. 335-339; *Woolf v. St. L. &c. Co.*, 10 Cal. 541; *Hoffman v. Water Co.*, 10 *Id.* 413; *Everett v. Hydraulic Co.*, 23 Cal. 225.

<sup>4</sup> *Water Co. v. Fletcher*, 23 Cal. 481. "Ditch or reservoir owners are to the same extent liable for injury caused to adjacent lands by percolation of water through the soil, flooding of wells and cellars of a house. (See *Fuller v. Chicopee Manf. Co.*, 16 Gray, 46; *Wilson v. New Bedford*, 108 Mass. 261; *Pixley v. Clark*, 35 N. Y. 520.) As to whether parties maintaining reservoirs upon their premises are bound to a stricter responsibility, see *Rylands v. Fletcher*, L. R. 1 Exch. 265." B. & W. L. C. 741.

<sup>5</sup> *Wilson v. Bear River &c. Co.*, 24 Cal. 367. Just how far a mining custom to let tailings run free down a gulch, without any hindrance, to the interference and injury of the mining operations and property of persons locating for mining purposes in the same gulch lower down, and after such custom or regulation has been established, see *Lincoln v.*

§ 237. **Right to divert water.**—The prior appropriator of water for mining purposes can extend his ditch at a certain point, and use the water to the extent of his appropriation, at any other point, for the same or a different purpose,<sup>1</sup> provided he does not thereby injure the rights of prior appropriators on the same stream.<sup>2</sup> And he also has the right by virtue of his appropriation, to enlarge his ditch at his pleasure, and if, in so doing, he does not thereby use more water than was first appropriated by him, others having water rights in the same stream are not in a position to complain,<sup>3</sup> for the first appropriator has the right to work his mining claim as he chooses and to use the water for such purposes as may suit his own convenience, notwithstanding the rights of subsequent locators on the same stream.<sup>4</sup> But as between ditch owners and miners using the waters of a stream for mining purposes, the law will not tolerate any injury by one to the prior rights of the other, for the very essence of the right is the priority of its exercise.<sup>5</sup> The appropriator is bound, gen-

Rodgers, 1 Mon. 217; *Esmont v. Chew*, 15 Cal. 187; *Logan v. Driscoll*, 19 Cal. 628.

<sup>1</sup> *Woolman v. Gorringer*, 1 Mont. 535. "The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation, without interruption or diminution in quantity." *Phoenix W. Co. v. Fletcher*, 28 Cal. 492; *M. M. D.* 405. "The first appropriator of water for mining purposes is entitled to have the water flow, without material interruption, in its natural channel." *Bear River Co. v. N. Y. Mining Co.*, 8 Cal. 327; *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185. "He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him." *Id.*; *M. M. D.* 405.

<sup>2</sup> *Hill v. Smith*, 27 Cal. 476.

<sup>3</sup> *James v. Williams*, 31 Cal. 211; *Richardson v. Kler*, 34 Cal. 68; *White v. Todds Valley Water Co.*, 8 Cal. 443; *Union Water Co. v. Crary*, 25 Cal. 504.

<sup>4</sup> *Stone v. Bumpus*, 46 Cal. 218.

<sup>5</sup> *Hill v. Smith*, 27 Cal. 476.

erally, to a reasonable use of the waters under the circumstances, for the purposes for which it was appropriated, and he will not be permitted to wholly divert or obstruct the stream, whether for purposes of irrigation or otherwise.<sup>1</sup> However, the miner is only bound to use ordinary care and diligence in the management of the water appropriated by him, and if, notwithstanding such care as a reasonably prudent person would have exercised, the water causes injury to the property or rights of miners further down the stream, the appropriator having control of the water would not in such case be liable for the injury caused.<sup>2</sup>

§ 238. *Sale and transfer of water right.* — In some of the Western States the miner's right to appropriate running streams of water has been specially declared to be real property, by statute,<sup>3</sup> capable of abandonment, the same

<sup>1</sup> *Barnes v. Sobray*, 10 Nev. 207; *Caruthers v. Pemberton*, 1 M. F. 111; *Anthony v. Lapham*, 5 Pick. 175; *Webb v. Portland M. Co.*, 3 Sumner, 189; *Gerrish v. Newmarket M. Co.*, 10 Foster, 470; *Canal Appraisers v. People*, 17 Wend. 570; *Davis v. Getchell*, 50 Me. 602; *Board of Trustees v. Haven*, 11 Ill. 554; *Moffat v. Brewer*, 1 Green (Iowa), 348; *B. & W. L. C.* 746.

<sup>2</sup> *Campbell v. Bear River Co.*, 35 Cal. 679; *Everett v. Hydraulic F. T. Co.*, 23 Cal. 225; *Livingston v. Adams*, 8 Cowen, 175; *Gregory v. Nelson*, 41 Cal. 289; *Woolf v. St. L. & C. Co.*, 10 Cal. 541; *Angell on Waters*, 380, Sec. 386. If the party claiming the water right has not yet completed the construction of his dam or reservoir, since he is not in a condition to appropriate the water the use by other parties is no injury to him and he is not entitled to relief either legal or equitable. *Nevada Water Co. v. Powell*, 34 Cal. 109; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 282. But just what cases would be actionable and what not, must necessarily differ according to the extent and value of the property injured, the amount of damage done and other circumstances of a similar nature. *Richardson v. Kier*, 34 Cal. 68; *Wilson v. New Bedford*, 108 Mass. 261; *Shearman & Redfield on Neg.*, § 557 *et sub.*; *Copper King v. Wabash Min. Co.*, 114 Fed. Rep. 991 (U. S. C. C., Cal., 1902); *Churchill v. Louie*, 67 Pac. Rep. 1052.

<sup>3</sup> See Civil Code Cal.; Statutes different States; *Reed v. Spicer*, 27 Cal. 57; *Clark v. Willet*, 35 *Id.* 534.



as the right of location of a mining claim,<sup>1</sup> and subject also to sale and transfer, like any other species of realty.<sup>2</sup> A water right is not necessarily an appurtenance that would pass with a transfer of the land, nor would the fact that the water right, or the water used at a certain mining plant, be such a fact from which the court would presume that such right was appurtenant to the claim,<sup>3</sup> but the burden of proving that the water ditch and water was appurtenant to the claim would devolve upon the party who affirmed it to be the fact, and such proof would have to be adduced, even in the face of the fact that a large portion of the water from the ditch was used upon the claim.<sup>4</sup> But the rights of an appropriator of running water would not be affected by a transfer or diversion in the course of a stream, resulting from a sale and division of the land on which the same ran, and if the owner of land on which the stream was running should change its course by making an artificial ditch to drain off the water and then convey that portion of the land on which the natural channel was located to one person and that containing the artificial water-course to another, the rights of the appropriator would not be affected by such transfer, but the respective

<sup>1</sup> *Reed v. Spicer, supra*; *Clark v. Willet, supra*; *McDonald v. Bear River & A. W. & M. Co.*, 13 Cal. 223; *Blanchard & Weeks Leading Cases on Mines, Minerals and Mining Water Rights*, p. 751; *Davis v. Butler*, 6 Cal. 510; *Richardson v. McNulty*, 24 Cal. 339; *Hoffman v. Stone*, 7 Cal. 46; *St. John v. Kidd*, 26 Cal. 263; *Ferris v. Cooney*, 10 Cal. 181; *Dougherty v. Creary*, 30 Cal. 290; *Moon v. Rollins*, 36 Cal. 333; *Smith v. Cushing*, 41 Cal. 97; *McLeran v. Benton*, 43 Cal. 467.

<sup>2</sup> *McDonald v. Bear River & A. W. & M. Co.*, 13 Cal. 223; *Heynemois v. Blake*, 19 Cal. 579. "A water right is, under the law of Montana, 'such a species of realty' as to require for its transfer the same form and solemnity as the conveyance 'of other real estate.'" *Barkley v. Tieleke*, 2 Mont. 59. M. M. D. 409.

<sup>3</sup> *Quirk v. Folk*, 47 Cal. 458.

<sup>4</sup> *Quirk v. Folk, supra*; *Blanchard & Weeks Lead. Cas. on Mines, Minerals and Water Rights*, p. 755.

grantees would each hold his portion of the estate, under the changed conditions, subject to the same burdens, the former relieved from, but the latter burdened with the stream.<sup>1</sup>

§ 239. **Subterranean streams—No easement in.**—The law as to subterranean waters differs from that affecting the rights of surface streams.<sup>2</sup> It has been established by a long line of English cases, based upon the Roman law,<sup>3</sup> and followed in this country, that the owner of land through which water flows in a subterraneous course has no rights therein sufficient to support an action against an adjoining landowner who drains such water from the land of the first owner, by reason of conducting mining operations on his own land, in the usual and customary manner.<sup>4</sup> The damage, in such case, if any, is *damnum absque injuria*.<sup>5</sup> The enforcement of such rights would lead to the most

<sup>1</sup> *Roberts v. Roberts*, 55 N. Y. 275; *Lampman v. Mills*, 21 N. Y. 505; *Story v. Odin*, 12 Mass. 157; *Blanchard & Weeks Ld. Cas.*, etc., p. 751.

<sup>2</sup> *Delhi v. Youmans*, 50 Barbour, 816.

<sup>3</sup> See opinion of Wensledale, J., in *Chasemore v. Richards*, 7 H. L. Cases, 349; Pothier's Ed. 1782 (Vol. 3), p. 20.

<sup>4</sup> *Chasemore v. Richards*, 7 H. L. Cases, 349; *Acton v. Blundell*, 12 M. & M. 324; *Smith v. Henrich*, 7 C. B. 515; *Bolston v. Bensted*, 1 Comp. 463; *Dickinson v. Grand Junc. Canal Co.*, 7 Ex. Ch. 282; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Chase v. Silverstone*, 62 Me. 175; *Parker v. B. & M. R. R.*, 3 Cush. 107; *Greenleaf v. Francis*, 18 Pick. 117; *Delhi v. Youmans*, 50 Barb. 816; *Frasier v. Brown*, 12 Ohio St. R. 294; *Routh v. Driscoll*, 20 Conn. 533; *Brown v. Illius*, 25 Conn. 593; *Ellis v. Duncan*, 21 Barb. 230; *Wheatley v. Baugh*, 25 Penn. St. 528; *Haldeman v. Bruckhart*, 45 Penn. St. 518; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; B. & W. L. C. 750 *et sub*.

<sup>5</sup> *Ante, idem*. "The owner of land through which water flows or percolates in an underground course, has no right or interest in it which will enable him to maintain an action against a landowner, who by mining in the usual manner on his own land drains away the water from the spring or well of the owner of the neighboring land and leaves it dry." *Acton v. Blundell*, 12 M. & W. 324; B. & W. L. C. 758; M. M. D. 407.

speculative results and would be contrary to every reasonable consideration of the subject. The rights recognized by the courts, in surface streams, is based upon the consent of others interested, to the exercise of the first appropriator's rights, and the utility and enjoyment of the same.<sup>1</sup> In the case of subterranean streams no consent of the owners of the land over which such streams run could be presumed, for the course and extent of such streams could only be a matter of conjecture and the enjoyment and utility of an unknown stream is itself a mere speculation.<sup>2</sup> But if the subterranean stream flowed in a natural and defined water-course, like some of the Western streams that flow for miles through limestone caverns and then emerge to the surface, the rule applying to surface water would obtain and the rights of the appropriator would be protected by the courts.<sup>3</sup> And even in

<sup>1</sup> *Acton v. Blundell*, 12 M. & W. 324; *Smith v. Kenrick*, 7 C. B. 515; 3 Kent's Com. 439-455; *Tyler v. Wilkinson*, 4 Mason, 400; *Wright v. Howard*, 1 Lim. & S. 190; *Mason v. Hill*, 5 B. & Ad. 1; *Shury v. Pigott*, 3 Bulstr. 339. "Where subterranean waters were not shown to exist in the form of a stream, but consisted of water percolating through a large area of porous soil, with no regular stratification, an adjoining owner of such soil cannot enjoin another from diverting such water on the ground of an infringement of plaintiff's riparian rights therein. *Katz v. Walkinshaw* (Cal. 1902), 70 Pac. Rep. 663.

<sup>2</sup> See opinion of Lord Wensleydale in *Chelmsford v. Richards*, 7 H. L. Cases, 349; *Acton v. Blundell*, 12 M. & W. 324; *Dickinson v. G. I. G. Co.*, 7 Exch. 282, where the court observed: "That the existence and state of underground water is generally unknown before a well is made; and after it is made there is a difficulty in knowing, certainly, how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbor. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters." B. & W. L. C. 757.

<sup>3</sup> *Wood v. Wand*, 4 Exch. 748; *Dickinson v. The Grand Junction Canal Co.*, 9 Eng. Law. & Eq. 521; *Holdeman v. Bruckhart*, 45 Pa. St. 514; *Wheatly v. Baugh*, 25 Penn. 531; *Duddree v. Guardians, etc.*, 1 Hurl.

the case of subterraneous unknown streams the party draining and diverting the water may be rendered liable if such diversion is accompanied with any malice or he has been grossly negligent in his mining operations,<sup>1</sup> and perhaps the best test for measuring the liability in such cases is the reasonableness of the uses to which the diverted stream is adopted and the diverter's good or bad faith in the transaction.<sup>2</sup>

§ 240. As to percolations. — Where water has percolated through one tract of land to another, and collected in a swamp or marsh, the rules of law governing the rights of parties to the water of regular streams, flowing in a natural channel, whether such streams are above or beneath the surface, do not apply. No rights can be acquired in such water that would prevent its diversion. The owner of the land on which the same has collected may draw off the water from the swamp, or divert the percolation so as to collect the water in a more desirable place on his land notwithstanding it may result in serious detriment to the adjacent proprietor,<sup>3</sup> providing such diversion be without malice.<sup>4</sup>

& N. 627; *Frasier v. Brown*, 12 Ohio, 300; *Whetstone v. Bowser*, 29 Price, 56; *Delhi v. Youmans*, 45 N. Y. 362.

<sup>1</sup> *Delhi v. Youmans*, *supra*. "No person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well, without any purpose of usefulness to himself. *Greenleaf v. Francis*, 18 Pick. 117; approved in *Wheatley v. Baugh*, 25 Penn. 531, and *Roath v. Driscoll*, 20 Conn. 538; *Parker v. Boston & Maine R. R. Co.*, 3 Cush. 107; *Radcliff's Executors v. Mayor of Brooklyn*, 4 N. Y. 195." B. & W. L. C. 758 *et sub*.

<sup>2</sup> *Ante*, *idem*.

<sup>3</sup> *Dickinson v. Canal Co.*, 7 Ex. Ch. 300; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Smith v. Kendrick*, 7 C. B. 566; *Acton v. Blundell*, 12 Mees. & W. 324; *Chose v. Silverstone*, 62 Me. 475; 16 Am. Rep. 419; *Greenleaf v. Francis*, 18 Pick. 117; *Luther v. Winnismet Co.*, 9 Cush. 171; *Tiedeman on R. P.*, § 615; *Chasemore v. Richards*, 5 H. & M. 982.

<sup>4</sup> *Ante*, *idem*; *Parker v. Boston & M. R. R.*, 3 Cush. 107; *Roath v.*

Nor would an action lie for draining surface water over adjoining lands through natural channels, although the owner of the adjoining land would have the right to prevent the overflow of his land by the erection of barriers or other suitable means.<sup>1</sup> However, one is not permitted, in the drainage of such water, to direct the flow upon adjoining land by means of drains or ditches, although it is permissible by such means to empty the water into a natural stream, and if the volume of the stream is thereby increased to such an extent as to cause damage to the riparian owners below, they are without remedy.<sup>2</sup>

§ 241. **Artificial water-courses.**—As to the rights acquired by the use of the water the same rule obtains in the case of artificial water-courses that applies to percolations. No one has the right to establish an artificial water-course upon the land of another, but if the landowner should assent to its construction, he would not thereby acquire an easement in the water, and could not thereby compel its perpetual maintenance, however much he might be injured from its discontinuance. The party creating the artificial stream can stop or divert it at his pleasure and since it is constructed for certain purposes,

Driscoll, 20 Conn. 533; *Delphi v. Youmans*, 45 N. Y. 363; 6 Am. Rep. 100; *Ellis v. Duncan*, 21 Barb. 230; *Whately v. Baugh*, 25 Pa. St. 528; *Frazier v. Brown*, 12 Ohio, 311.

<sup>1</sup> *Greeley v. Maine Cent. R. R.*, 53 Me. 200; *Gannon v. Hagadon*, 10, Allen, 106; *Parks v. Newburyport*, 16 Gray, 29; *Swett v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 459; *Bowlsby v. Speer*, 31 N. J. L. 351; *Hoyt v. Hudson*, 27 Wis. 656. But see *Gerrish v. Clough*, 48 N. H. 9; 2 Am. Rep. 165, and *Ogburn v. Connor*, 4 Cal. 346; 13 Am. Rep. 213.

<sup>2</sup> *Dickinson v. Worcester*, 7 Allen, 19; *Waffle v. N. Y. Cent. R. R.* 53 N. Y. 11; 13 Am. Rep. 467; *Miller v. Laubach*, 47 Pa. St. 154; *Butler v. Peck*, 16 Ohio St. 334; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Smith v. Kendrick*, 7 C. B. 515; *Tiedeman R. P.*, § 615, p. 480.

the adjoining owner could not, by mere use and enjoyment, acquire a prescriptive right to its continuance.<sup>1</sup>

<sup>1</sup> *Arkwright v. Gell*, 5 Mees. & W. 203; *Mayor v. Chadwick*, 11 A. & E. 571; *Elliott v. N. E. Ry.*, 10 H. L. Cas. 333; *Beasten v. Wheat*, 5 E. & B. 986; *Wright v. Williams*, 1 Mees. & W. 77; *Saunders v. Newman*, 1 B. & Ald. 258; *Napier v. Bulwinkle*, 5 Rich. 317; *Tiedeman R. P.*, § 616; *Washburn on Easements and Servitudes*, 294. "While, in such cases as *Arkwright v. Gell*, the landowner over which the water flows would have no right to divert the water — since to him it is, as to the riparian proprietors below, as a natural stream — it would not be competent for the mine-owner, though he might stop it, to foul or corrupt the same, to the injury of the proprietors upon the stream. To that extent, if suffered to flow, it had the incidents of a natural stream, even as against the one who had created it." (*Washburn on Easements and Servitudes*, 296.) *Blanchard & Weeks Ltd. Cas. on Mines, Mineral and Water Rights*, p. 822.

## CHAPTER XVI.

### FORFEITURES.

- SECTION** 242. How regarded in equity.  
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§ 242. **How regarded in equity.** — Equity will ordinarily grant relief in cases of forfeiture where the damage resulting from the non-performance of the agreement is susceptible of pecuniary measurement and compensation.<sup>1</sup> Especially is this true where the forfeiture results from the non-payment of money, or where the failure to perform the act was of no real detriment to the party claiming the forfeiture.<sup>2</sup> But where the forfeiture is the result of the nonperformance of a condition precedent to the vesting of the title, or the enjoyment of the right in the party

<sup>1</sup> Bisp. Prin. Eq., § 181, p. 236; *Hagar v. Buck*, 44 Vt. 285; *Palmer v. Ford*, 70 Ill. 369; *Orr v. Zimmerman*, 63 Mo. 72.

<sup>2</sup> Bisp. Prin. Eq., *supra*; *Oil Creek Co. v. Grt. West. Ry. Co.*, 7 P. F. Sm. 65; *McKim v. White Hall Co.*, 2 N. Y. Ch. 510; *Clarke v. Drake*, 3 Chand. 253; *Gordon v. Lowell*, 21 Maine, 251.

against whom the forfeiture operates,<sup>1</sup> or where it grows out of the breach of a covenant to perform some specific act, unless there are special circumstances calling for interference, a court of equity will not ordinarily afford relief in such cases, for the reason that the damage incurred by the breach is not susceptible of pecuniary measurement.<sup>2</sup> There is generally no way to determine what the measure of damage should be, and the court would not grant the relief out of mercy for the promisor, because his covenant was peculiarly hard to perform, or for the mere purpose of saving his property from forfeiture.<sup>3</sup> Nor would equity interfere where the exaction is made for the protection of a vendor, under circumstances where a strictly legal right is claimed, with full notice to the vendee, notwithstanding its general abhorrence to conditions that work forfeitures.<sup>4</sup>

§ 243. Same — Equity will not enforce a forfeiture. — Actions by the lessor, to recover possession, because of a

<sup>1</sup> *Reves v. Foulman*, 25 Ala. 452; *Wescott v. Minnesota Min. Co.*, 23 Mich. 145.

<sup>2</sup> *Bisp. Prin. Eq.*, § 181, p. 237; *Wafer v. Macota*, 9 Mad. 112; *Reynolds v. Pitt*, 19 Ves. 141; *Germantown Co. v. Fidler*, 10 P. F. Sm. 131; *Dunklee v. Adams*, 20 Verm. 415; *In re Brain*, L. R. 18 Eq. 389.

<sup>3</sup> *Bisp. Prin. Eq.*, *supra*.

<sup>4</sup> *Ante, idem.* See also *Brown v. Vandergriff*, 30 P. F. Sm. 142. Forfeiture must be strictly proved and will be strictly construed. *Hammer v. Garfield Min. Co.*, 130 U. S. 291; *Power v. Sla* (Mont., 1900), 61 Pac. Rep. 468; *Turner v. Sawyer*, 150 U. S. 585; *Black v. Elkhorn Co.*, 163 U. S. 445; *Emerson v. McWhirter*, 133 Cal. 510; 20 Am. & Eng. Enc. Law (2 Ed.), 732 *et sub.* "The tendency of the courts has been to favor the lessor rather than the lessee, and the old rule that the law abhors a forfeiture has been much softened in dealing with oil and gas leases." *George O. Dix*, in 48 Cent. Law. Journ. 475; citing *Brown v. Vandergriff*, 30 Pa. St. 142; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Guffy v. Hukill*, 34 W. Va. 49; *Bretman v. Harness*, 43 W. Va. 433; *Crawford v. Ritchey*, 27 S. E. Rep. 220; *Manroe v. Armstrong*, 96 Pa. St. 307.



forfeiture of the lease by the tenant, must be brought at law, as a court of equity has no jurisdiction to decree a forfeiture,<sup>1</sup> unless conferred by statute. It is a familiar jurisdiction of equity courts to interfere to relieve against the enforcement of a forfeiture, but a court of equity will never use its jurisdiction to enforce a forfeiture.<sup>2</sup>

§ 244. **Forfeiture distinguished from abandonment.** — While discussing the effect of a forfeiture upon the rights of a claimant on the public land, it may be well to distinguish between the legal effect of a forfeiture of the claimant's rights and an absolute abandonment of the claim. The claim of an original locator may of course be forfeited by abandonment, and his failure to perform the requisite amount of work and labor taken as evidence of an abandonment of the claim,<sup>3</sup> but the effect of an abandonment upon the proprietary rights of the claimant, is very different in law from that of a forfeiture.<sup>4</sup> A forfeiture can take place without any intent on the part of the locator to release his rights or interest in the claim,<sup>5</sup> for the performance of a certain amount of work and labor is in the nature of a condition subsequent, the enjoyment of the posses-

<sup>1</sup> *Hoch v. Bass*, 183 Pa. 328; *Drake v. Local*, 157 *Id.* 17; *Lynch v. Versailles Gas Co.*, 165 Pa. 518 (1895); *In re Brain*, L. R. 18 Eq. 389; *Plachy v. Somerset*, 1 Str. 447; *Bowser v. Colby*, 1 Hare, 109.

<sup>2</sup> *Authorities, supra*; *Messersmith v. Messersmith*, 22 Mo. 369; *Blsp. Pr. Eq.*, § 181, p. 238; 15 *Mor. Min. Rep.* 433; 7 *Mor. Min. Rep.* 238; 12 *Mor. Min. Rep.* 669; 12 *Idem*, 510. See *Cole v. Taylor* (8 Pa. Super. Ct. 19), where the court holds that an oil lease ought, *in equity*, to be forfeited, for failure to work for two years.

<sup>3</sup> *Oreamund v. U. S. G. & S. M. Co.*, 1 Nev. 309; *Strong v. Ryan*, 46 Cal. 33; *Duprey v. Williams*, 26 *Id.* 309.

<sup>4</sup> *Richardson v. McNulty*, 24 Cal. 339; *Blanchard & Weeks Ld. Cas.*, p. 206, also p. 215 *et sub.*

<sup>5</sup> *Blanchard & Weeks Ld. Cas.*, pp. 215-216; *St. John v. Kidd*, 26 Cal. 263; *King v. Edwards*, 1 Mont. 235; *Bell v. Bed Rock Co.*, 33 Cal. 214.

sion depending on the performance of the condition and a failure to perform it operating to defeat his title *ipso facto*.<sup>1</sup> In order to constitute an abandonment, however, there must always be an intent, on the part of the locator, to abandon his claim;<sup>2</sup> and while a forfeiture can be cured, even after failure to perform the necessary work, by a resumption of the work before the acquisition of adverse rights,<sup>3</sup> where a claimant has voluntarily abandoned his rights, his claims thereto are utterly extinguished as soon as the abandonment has taken place.<sup>4</sup> An abandonment should be set up, the same as a forfeiture, in order to be taken advantage of by an adverse claimant;<sup>5</sup> and the intent of the original locator to abandon his claim is a mixed question of law and fact.<sup>6</sup> But an abandonment can be

<sup>1</sup> King v. Edwards, *supra*; B. & W. L. C. 222. It would seem a different rule prevails in this regard between forfeiture for failure to work claim on public land under statute, and the rule applying in cases of breach of covenant, for the latter does not result *ipso facto* on breach of the condition, but only on the lessor's election, by some decisive act, to take advantage of the clause. See Roberts v. Davey, 4 B. & Ad. 664; *s. c.* 1 Nev. & Mon. 448; Doe v. Banks, 4 B. & Ald. 401; In re East Hongsberg Co., Biggs Case, L. R. 1 Eq. 309; Mor. Min. Dig., p. 112. But as no third party can enter on a public claim while the original locator remains in possession, the distinction is not of much importance. Bradley v. Lee, 38 Cal. 362.

<sup>2</sup> Wiseman v. McNulty, 25 Cal. 280; Richardson v. McNulty, 24 *Id.* 339; Wilson v. Cleveland, 30 Cal. 192; B. & W. L. C. 216, 224. Lapse of time may be proven as a circumstance to show an abandonment. Mallet v. U. S. G. & S. M. Co., 1 Nev. 189; Waring v. Crow, 11 Cal. 366,

<sup>3</sup> Bradley v. Lee, *supra*; Mor. Min. Rights (4 Ed.), 65.

<sup>4</sup> St. John v. Kidd, 26 Cal. 263; King v. Edwards, 1 Mont. 235; Richardson v. McNulty, 24 Cal. 339; Stephens v. Mansfield, 11 Cal. 365 (cited and commented on in Richardson v. McNulty, *supra*).

<sup>5</sup> In Bell v. Brown, it was held that either abandonment or forfeiture could be proved under the general issue. B. & W. L. C. 224. But abandonment need not be specially pleaded as in the case of a forfeiture Morenhout v. Wilson, 52 Cal. 263; overruling Bell v. Brown, *supra*.

<sup>6</sup> Wilson v. Cleveland, 30 Cal. 192; Richardson v. McNulty, 24 Cal. 339;

taken advantage of under a general denial,<sup>1</sup> while a forfeiture cannot be taken advantage of even as a defense, unless it is specially pleaded.<sup>2</sup>

§ 245. **How enforced.** — A forfeiture can generally only result from a breach of the condition which was to work a forfeiture of the promisor's rights, or a failure to comply with some provision of the contract which was to render it null and void.<sup>3</sup> Where the parties have agreed upon the causes or conditions which are to terminate the contract, it cannot be terminated on any other grounds but those agreed upon, and the acts or conditions which are to work the forfeiture must actually have been performed, before the rights of the parties under the contract can be disturbed.<sup>4</sup> The parties are held to have contracted with reference to the state of things existing at the time the contract was made;<sup>5</sup> both are entitled to the benefit of the provisions of the contract, and while the one can insist on the right of forfeiture, the other can also claim that the conditions of the forfeiture be per-

B. & W. L. C. 206. As to circumstances admitted to prove abandonment, see *Warring v. Crow*, 11 Cal. 366; *Mallet v. Min. Co.*, 1 Nev. 189.

<sup>1</sup> *Morenhout v. Wilson*, *supra*.

<sup>2</sup> *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534. An allegation of forfeiture is a legal conclusion, the facts must be stated. B. & W. L. C., p. 225; *Morenhout v. Wilson*; *U. S. v. Heth*, 3 Crouch, 399, 413; *Williamson v. N. J. S. R. Co.*, 29 N. J. Eq. 311; *Martindale v. Warner*, 15 Pa. St. 471; *Orr v. Rhyne*, 45 Tex. 345; *Marsh v. Chestnut*, 14 Ill. 223; *Abington v. Duxbury*, 105 Mass. 287; *Lucas v. Tucker*, 17 Ind. 41.

<sup>3</sup> *Tilley v. Meyers*, 25 Pa. St. 397; B. & W. L. C., p. 438. As to claim on public land, see *McGarrity v. Byington*, 12 Cal. 427. Where forfeiture is not made a penalty for the breach, damages alone can be recovered. *Meyers v. Tilley*, 32 Penn. 267; *Blanchard & Weeks Ld. Cas.*, *supra*.

<sup>4</sup> Forfeitures are construed strictly. *Van Schmidt v. Huntington*, 1 Cal. 70; *Coleman v. Clemens*, 23 Cal. 248; *Bishop Con.*, §§ 417-418; *Taylor v. Paterson*, 9 L. Ann. 251.

<sup>5</sup> *Bishop on Con.*, § 1337 *et sub*.

formed.<sup>1</sup> If the only method of forfeiture mentioned in the contract, is a re-entry by the owner, there can be no completed forfeiture without such re-entry;<sup>2</sup> and to be able to claim the right, the owner must not have acquiesced in, or contributed to the breach which was to work a forfeiture.<sup>3</sup> But where a lease contains a clause of forfeiture for breach of any covenant, but does not hold the lessor to a re-entry, in order to claim such forfeiture, a demand and re-entry, although generally essential, is not the only mode by which the lessor can enforce the forfeiture.<sup>4</sup>

§ 246. Party entitled to must declare election.—Forfeiture does not, generally, result, *ipso facto*, from the acts constituting the breach of the condition of the right

<sup>1</sup> *Coleman v. Clemens*, 23 Cal. 248; *Clarke v. Hart*, 6 H. L. Cas. 688; *Stewart v. Anglo-Cal. G. M. Co.*, 21 L. J. Q. B. 398; *Morrison's Min. Dig.* pp. 118-114.

<sup>2</sup> *Tiedeman R. P.*, § 277. And the entry must be with the intention of working a forfeiture. *Andrews v. Senter*, 32 Me. 394; *Rollins v. Riley*, 44 N. H. 18; *Bowen v. Bowen*, 18 Conn. 535. There must also be some act on lessor's part showing his election to claim the forfeiture. *Roberts v. Davey*, 4 B. & Ad. 664; *Doe v. Bankes*, 4 B. & Ald. 401; *Mor. Min. Dig.*, p. 111.

<sup>3</sup> *Grave v. Donaldson*, 15 Penn. 128. If default is mutual, forfeiture cannot be enforced. *Doe v. Morris*, 2 Taunt. 52; *Mor. Min. Dig.*, p. 113.

<sup>4</sup> An action of ejectment will generally have the same effect as a re-entry. 2 Washb. on R. P. 18; *Tiede. R. P.*, § 277 p., 185; *Kelway v. Seymour*, 29 N. J. L. 329; *Fonda v. Loga*, 46 Barb. 123; *Green v. Pettin-gill*, 47 N. H. 375; *Searns v. Harris*, 8 Allen, 598. And see generally as to what acts will amount to a claim of the right of forfeiture by the land owner, *Blanchard & Weeks, Ld. Cas.*, p. 439. "A breach of condition of the lease, an abandonment of possession, an entry and occupation of the surface by other tenants of the lessor, a written lease by the lessor of a part of the mine to others — notices sent to parties who had in former years worked the mine, that the lessor had entered for breach of condition, and to determine the lease; all these things may tend to establish a virtual re-entry by the lessor." *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; B. & W. L. C., *supra*.

or title;<sup>1</sup> if the right of forfeiture was not exercised, a forfeiture would not result,<sup>2</sup> and for this reason it is held to be necessary for the party entitled to the forfeiture to manifest his election to take advantage of his right, or he will be deemed to have waived the same.<sup>3</sup> After breach of a condition authorizing a forfeiture, however, in the absence of evidence of a waiver of same, it would not be presumed that the forfeiture was waived,<sup>4</sup> and an entry into possession on the part of the party entitled to the forfeiture would be evidence of his election to take advantage of the right.<sup>5</sup>

§ 247. **Same — Notice must be definite.** — Where the law or contract authorizing the forfeiture, does not provide for notice of the election to declare, no notice would be neces-

<sup>1</sup> *Oreamund v. Uncle Sam G. & S. M. Co.*, 1 Nev. 215. Does not result from mere words authorizing. *Gale v. Oil Run Pet. Co.*, 6 W. Va. 200.

<sup>2</sup> *In re East Kongsberg Co.*, *Biggs Case*, L. R. 1 Eq. 309. "In order to work a forfeiture, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues." *Wiseman v. McNulty*, 25 Cal. 230; M. M. D. 111.

<sup>3</sup> *Roberts v. Davy*, 4 B. & Ad. 664; s. c. 1 Nev. & Mon. 443.

<sup>4</sup> *McKnight v. Kreutz*, 51 Pa. St. 232; s. c. 53 Pa. St. 319.

<sup>5</sup> "A coal lease required the lessee to make monthly returns, under oath, and to pay the rent monthly; and to take out 72,000 bushels per annum; with privilege of re-entry in case of breach. A breach of these covenants being proved, and the lessors having resumed possession, it should have been presumed that possession had been resumed under the clause to that effect in the lease, and in the absence of proof to the contrary, it was error to submit to the jury whether they had waived their right to determine the lease." *McKnight v. Kreutz*, 51 Pa. St. 232; s. c. 53 *Id.* 319. "The neglect to enforce a forfeiture during more than two years, while in the meantime lessees were not working the mine, was not a waiver of the right to insist upon forfeiture." *Id.*; M. M. D. 112. Where lease is void, unless oil well is bored in a year or stipulated sum paid to lessor, he will be held to have elected to avoid lease by executing a second lease to same tract. *Kenton Gas Co. v. Dorney*, 17 Ohio C. C. 101.

sary,<sup>1</sup> but any act on the part of the person entitled to the forfeiture, going to show his election to claim such right, would be competent to show his claim.<sup>2</sup> But as the right to exercise a forfeiture is strictly construed, all conditions precedent must be performed before a party can claim, and where the law or contract provides that the election to declare must be by notice to the adverse party, no forfeiture will result, unless notice is given,<sup>3</sup> and it must be a notice in the manner contemplated;<sup>4</sup> and any ambiguous or uncertain declaration of the intention to take advantage of the forfeiture would be held insufficient.<sup>5</sup>

<sup>1</sup> *Stewart v. Anglo Cal. G. M. Co.*, 21 L. J. Q. B. 398.

<sup>2</sup> *McKnight v. Kreutz*, 51 Pa. St. 232; *s. c.* 53 *idem*, 819

<sup>3</sup> *Westcott v. Minn. Min. Co.*, 23 Mich. 145. Failure to give notice was held to prevent forfeiture in *South Penn. Oil Co. v. Stone* (Tenn. Ch. App.), 57 S. W. Rep. 374 (1901).

<sup>4</sup> Notice of forfeiture of the interest of a co-owner of a mining claim held insufficient. *Haynes v. Briscoe* (Colo.), 67 Pac. Rep. 156 (1902). "Where there was a right of forfeiture of shares, on giving ten clear days notice, held that a notice to forfeit 'on Monday, the ninth,' was insufficient, the ninth day of the month falling, in fact, upon a Friday." *Watson v. Eales*, 23 Beav. 294; 26 L. J. Ch. 361; M. M. D. 113. "A., B. and C. joined in a mining adventure on the cost-book principle, as recognized in Devonshire and Cornwall. A. fell into arrears with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time. No payment was made, and no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited: Held, that such declaration of forfeiture was invalid." *Clarke v. Hart*, 6 H. L. Cas. 633. See *Hart v. Clarke*, 6 De G. M. & G. 232; 19 Beav. 349; M. M. D. 114.

<sup>5</sup> *Beatty v. Gregory*, 17 Iowa, 109; *Doe v. Banks*, 4 B. & Ald. 401. If lessor does not, in a reasonable time, give notice of the forfeiture, he is held to have waived same. *Alleghany Co. v. Oil Co.*, 86 N. Y. 638; *Thompson v. Christie*, 138 Pa. St. 230; *Carnegie Gas Co. v. Phila. Co.*, 158 Pa. St. 317; *Guffy v. Hukill*, 34 W. Va. 49; *Thomas v. Hukill*, 34 W. Va. 385; 20 Am. & Eng. Enc. Law, 2 Ed. 738.

§ 248. **How forfeitures are pleaded.**—A forfeiture cannot, ordinarily, be pleaded generally, but the specific facts constituting the forfeiture, the condition and the breach, should be definitely set forth.<sup>1</sup> For instance, in making a relocation of a claim on public land, that has been forfeited for a failure to perform the required amount of work and labor on the claim, the same acts are required by the subsequent locator that were necessary to complete the original location of the claim, and where there is a dispute between the party from whom the labor was due and the subsequent relocater of the same, if the latter tries to show a forfeiture in the original claimant, he must set out definitely in his pleadings the specific acts of the original locator that constitute the forfeiture.<sup>2</sup> And this rule prevails as well in the forfeiture of a claim on private lands as in claims on the public mining land, and for the breach of a condition in a contract, the same as a covenant, or stipulation in a lease. In all of these cases the forfeiture of the defendant's rights constitutes the foundation of the plaintiff's rights, and in accordance with the rule of pleading requiring the party plaintiff in a suit to first make out his cause in court, it is incumbent on the party seeking to enforce a forfeiture, to specially plead the same, together with the facts constituting the forfeiture and the burden of proof is upon him to show that there

<sup>1</sup> *Dutch Flat W. Co. v. Moony*, 12 Cal. 534. See *contra*, *Bell v. Brown*, 20 Cal. 871, where it was held it could be proved under the general issue. But see *Morenhout v. Wilson*, 52 Cal. 263, where *Bell v. Brown* is criticised.

<sup>2</sup> *Wade's Am. Min. Laws*, pp. 56-57, *Morenhout v. Wilson*, *supra*. "An answer to a complaint in ejectment for mining claims which alleges forfeiture by non-compliance with mining customs, etc., is insufficient in not setting forth the customs alleged to have been violated and so to have produced the forfeiture." *Dutch Flat W. Co. v. Moony*, 12 Cal. 534; *M. M. D.* 111.

was an actual breach, or failure to perform the condition working the forfeiture, by the party against whom the forfeiture is sought to be enforced.<sup>1</sup>

§ 249. **Arising from breach of contract.** — Forfeitures are regarded with such disfavor by the courts, that either a statute or a contract, looking to a forfeiture, will be construed strictly.<sup>2</sup> The courts lean to that which is beneficial and just as between the parties, and discourage whatever is unjust or inequitable. In interpreting a contract, they would ordinarily construe a clause as a promise or covenant, rather than as a condition working a forfeiture,<sup>3</sup> and where the clause is accepted as a condition, it will be interpreted strictly and not construed to intend more than the exact words used would imply.<sup>4</sup> In a mining contract, a clause looking to a forfeiture can be controlled or varied by a custom or rule of the mining camp contrary to the provision of the contract, and evidence would be admissible to prove the existence of the custom or rule, and thus change the liability of the promisor.<sup>5</sup> Where one promises, for instance, that he will sink a shaft until he strikes a solid rock, or forfeit all his interest in

<sup>1</sup> "A party who insists upon forfeiture or abandonment to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim or right depends." *Oreamount v. Uncle Sam G. & S. Min. Co.*, 1 Nev. 215; *Mór. Min. Dig.*, p. 112.

<sup>2</sup> *Coleman v. Clemens*, 28 Cal. 248; also *Van Schmidt v. Huntington*, 1 Cal. 70.

<sup>3</sup> *Bishop on Con.*, § 408; *Wier v. Simmons*, 55 Wis. 687; *Duryee v. New York*, 96 N. Y. 477.

<sup>4</sup> *Bishop on Con.*, *supra*; *Shep. Touch.* 133. A failure to comply with mining rules, where the operations are under the "register system," authorizes a re-entry at once by the landowner. *Fisher v. During*, 53 Mo. App. 548; *Rochester v. Mining Co.*, 86 Mo. App. 447.

<sup>5</sup> *Yale's Min. Claims*, Ch. 8; *B. & W. L. C.*, p. 120.



the same, evidence would be admissible to prove that it was customary in the district to regard water of a certain depth in the shaft, as equivalent to solid rock, covering the entire bottom of the shaft.<sup>1</sup> But where the promisor has failed to perform his part of a contract to sink a shaft, he cannot, under the contract, claim relief from a condition, waiving his right to remove his mining machinery, etc.,<sup>2</sup> until he is ready to perform the contract, although he could recover from the promisee, on a *quantum meruit*, for the value of his services rendered, provided they were of value and were received by the company.<sup>3</sup>

§ 250. **Clause of in lease.** — Conditions in a lease that work a forfeiture, are, as a general rule, regarded with odium by the courts, and the same rules of construction prevail as in the case of other contracts.<sup>4</sup> If the condition is capable of a double meaning, it would ordinarily be carried out in such a way as to obviate the necessity of a forfeiture, and parol evidence is admissible to explain latent ambiguities, to prove a local rule or custom, local terms and phrases,<sup>5</sup> and to apply the instrument to its subject,<sup>6</sup> but further than this parol evidence is not admissible, except to show fraud, duress or mistake.<sup>7</sup> A lessee who stipu-

<sup>1</sup> Although a contract is silent on the subject, a custom can be shown to compel timbering. *No. 5 Min. Co. v. Bruce*, 4 Colo. 293. But party will not, generally, be relieved from covenant. *Brinkerhoff v. Elliott*, 48 Mo. App. 185.

<sup>2</sup> *Rollerston v. New*, 4 Kay. & J. 640.

<sup>3</sup> *Bishop on Con.* 604.

<sup>4</sup> *Miller v. Chester State Co. (Pa.)*, 18 Atl. Rep. 565; 15 Am. & Eng. Enc. of Law, 601.

<sup>5</sup> *Stone v. Bumpus*, 46 Cal. 218; *Beaufort v. Smith*, 4 Ex. 450; *Rowe v. Brenton*, 8 B. & C. 758.

<sup>6</sup> *Roemer v. Nesmith*, 34 Cal. 624.

<sup>7</sup> *Bishop on Con.* 370-377. The lessor's right of forfeiture is not effected by an assignment for creditors by lessee. *Potter v. Gilbert*, 177

lates, unconditionally, to pay royalty on a certain amount of ore to be taken annually from the mine, will not be released from his contract to pay royalty on the stipulated quantity, even though a settlement has been made for all the mineral taken out.<sup>1</sup> But a stipulation to pay royalty, provided a certain amount of ore is found, and that a failure to deliver possession would be taken as an agreement that there was a sufficient quantity of ore on the premises, is not held to be conclusive as against the lessee, but is an admission which throws the burden of proof on him to show that there was not such a quantity.<sup>2</sup> A lease providing that the lessee shall pay for a certain quantity of mineral, at the end of each and every year, and that if any of the covenants be not complied with for the term of three months, the lease is to be null and void, is not forfeited by a failure to pay the amount due, at the end of the year, until the expiration of the three months thereafter,<sup>3</sup> and

Pa. St. 159; 35 Atl. Rep. 597. The grantees of a reversion have the same right to take advantage of a forfeiture clause that the original lessor had. *Robinson v. Boys*, 61 N. J. L. 179; 33 Atl. Rep. 813.

<sup>1</sup> *Powell v. Burrows*, 54 Pa. St. 329; *Clarke v. Midland Blast Furnace Co.*, 21 Mo. App. 58. But see *Clifford v. Watts*, L. R. 5 C. P. 577.

<sup>2</sup> *Cook v. Andrews*, 36 Ohio St. 174.

<sup>3</sup> *Hock's App.* (Penn.), 24 W. N. C. 37; 17 Atl. Rep. 512. Forfeiture for non-payment of royalty has been upheld in the following cases: *Clifton v. Walmesley*, 5 T. R. 564; *Bute v. Thompson*, 13 M. & W. 487; *Cooshaw Min. Co. v. South Car.*, 144 U. S. 550; *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665; *Malsocomson v. Wappoo Mills*, 85 Fed. Rep. 907; *Wheeler v. West*, 71 Cal. 126; *Maloney v. Love*, 11 Colo. App. 288; *Alderson v. Ennor*, 45 Ill. 128; *Carr v. Whitebreast Co.*, 88 Iowa, 136; *Swan v. Brown*, 8 Kan. App. 505; *Blake v. Lobb*, 110 Mich. 608; *Lennox v. Vandalia Coal Co.*, 66 Mo. App. 560; *Diamond Co. v. Buckeye Co.*, 70 Minn. 500; *Wonsetler v. Andrews*, 58 Oh. St. 551; *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; *Banna v. Greaff*, 186 Pa. St. 648; *Smith v. Godfrey* (Tenn.), 48 S. W. 303; *Cowan v. Iron Co.*, 83 Va. 547; *Coaldale Co. v. Clark*, 43 W. Va. 84; 20 Am. & Eng. Enc. Law (2 Ed.), 782.

a stipulation to complete a mine, within a certain time, or pay a certain sum agreed upon, for a failure to complete it according to contract, as the price of the delay, with a proviso that a breach of the two conditions would render the lease void, would not render it void, *ab initio*, so that a cause of action against the lessor, before the default, or by reason of it, would thereby be extinguished, but the lease would only be void from the date of the default.<sup>1</sup>

§ 251. **For failure to pay royalty.** — Unless the lease expressly makes it so, a failure to pay the stipulated royalty is not a ground of forfeiture,<sup>2</sup> and even where the condition is incorporated in the lease, no one but the lessor or his agents, or some one who possesses his rights, can take advantage of the forfeiture.<sup>3</sup> And where there is a clause of forfeiture in a lease for the nonpayment of royalty the lessor, at common law, is required to first make a demand of the lessee for the precise sum due, before he can enter upon the premises or claim a forfeiture of the lease;<sup>4</sup> and although the service of a declaration in ejectment is in some of the States held to be equivalent to a formal demand for the royalty,<sup>5</sup> in many of the States the same strict proof of a demand is required by the lessor to enable him to enter and work a forfeiture for the nonpayment of royalty.<sup>6</sup>

<sup>1</sup> In re East Kongsberg Co., Biggs Case, L. R. 1 Eq. 309; Roberts v. Davy, 4 B. & Ad. 664. Forfeiture will not result to lessee of oil well for failure to drill wells agreed to be drilled, unless there is a stipulation providing therefor. Harness v. Oil Co., 38 S. E. Rep. 662 (W. Va.). A forfeiture is for the benefit of lessor only and lessee cannot avoid liability on a covenant to work, because of his failure. Matthews v. People's Nat. Gas. Co., 179 Pa. St. 165; 36 Atl. Rep. 216.

<sup>2</sup> Gale v. Oil Run Petroleum Co., 6 W. Va. 200.

<sup>3</sup> Tiedeman on R. P., § 277 and cases cited.

<sup>4</sup> Tiedeman on R. P., *supra*.

<sup>5</sup> 2 Washb. on R. P. and cases cited; Stearns v. Harris, 8 Allen, 598.

<sup>6</sup> Osgood v. Abbot, 58 Me. 73; Bowen v. Bowen, 18 Conn. 535; Gray v. Blanchard, 8 Pick. 284.

But the courts of later days have always been averse to the common law doctrine of forfeiture, and in order to avert its operation, have frequently employed constructions of a somewhat arbitrary nature. For instance, where there is no provision for a re-entry in case of a default, a failure to pay royalty will not work a forfeiture of the lease, even though there be a covenant in the lease for the payment of royalty, and a condition of forfeiture annexed in case of default.<sup>1</sup> It is plain, however, that this construction is not in conformity with the manifest intention of the parties, but is rather subverting one of the settled doctrines of the law, for the purpose of maintaining the extreme of a doctrine that has grown obnoxious. The better doctrine now seems to be, although the law is substantially the same, that where parties have voluntarily subscribed to the conditions of a lease, a condition of forfeiture, like any other agreement into which the parties have entered, will be given its proper force, although a strict and perhaps unfavorable construction.<sup>2</sup>

<sup>1</sup> Taylor's Land. & Ten., § 494; Van Rensselaer v. Jewett, 2 N. Y. 147; Kenegre v. Elliott, 9 Watts, 258. But see, *contra*, Horton v. N. Y. Cent. & C. Ry., 12 Abb. N. C. 80, where a clause providing for the termination of the lease on default of royalty, although in the form of a stipulation, was held to be a condition working a forfeiture.

<sup>2</sup> Adams v. Oreknob Copper Co., 7 Fed. Rep. 684; Von Schmidt v. Huntingdon, 1 Cal. 70. See as to forfeiture of shares, *In re Cobre Copper Min. Co.'s*, Kelk's Case, L. R. 9 Eq. 107; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80. And the fact that a consideration has been paid would not prevent a forfeiture. Wood v. Leadbetter, 13 M. & W. 838. But a condition working forfeiture, if possible, will be construed as a covenant sounding in damages. McKnight v. Kreutz, 51 Pa. St. 282. And the owner, where the condition is supported, must not enter forcibly, or forcibly put another in possession. McKnight v. Kreutz, *supra*; Kreutz v. McKnight, 53 Pa. St. 319. Conditions construed strictly. Coleman v. Clemens, 23 Cal. 248; Von Schmidt v. Huntingdon, 1 Cal. 70.

§ 252. Under mining license. — The right of the licensee, under a license to mine, has been discussed before, and it has been seen that a mere parol license carries no interest in the land, but is essentially revocable at will, by giving the licensee the proper statutory notice to remove, and before such a license can confer on the licensee any continued right to the possession and enjoyment of the privileges acquired thereunder, it must be reduced to writing, and signed by the parties to be charged.<sup>1</sup> And even where the license is reduced to writing, as in the case of an agreement under a mining register, where there are conditions annexed to the enjoyment of the privilege by the licensee,<sup>2</sup> such conditions must be fully complied with, before he can acquire any substantial rights thereunder, and on breach of any such conditions the licensor is at liberty to revoke the license, and the licensee could acquire no title, but would be considered as a mere trespasser for such mineral as he might subsequently remove.<sup>3</sup> But

<sup>1</sup> Desloge et al. v. Pearce, 38 Mo. 588, and cases cited; Rogers on Mines, 313; Dark v. Johnson, 55 Pa. St. 164; Wheeler v. West, 71 Cal. 126; Harkness v. Burton, 39 Iowa, 101; Riddle v. Brown, 20 Ala. 412. Possession is not an incident of a mining license and licensee can maintain no possessory action. Springfield F. & M. Co. v. Cole, 180 Mo. 1; Arnold v. Bennett, 92 Mo. App. 156; Rochester v. Mining Co., 86 Mo. App. 447; Lowe v. Zinc Co., 89 Mo. App. 680. But see Lytle v. James (1903), 78 S. W. Rep. 287.

<sup>2</sup> Lunsford v. LaMotte Lead Co., 54 Mo. 426, a leading case, where defendants, under mining register, were held licensees of a revocable license. Rochester v. Mining Co., 86 Mo. App. 447; Fisher v. During, 53 Id. 548. A license, under mining rules, cannot be forfeited, except for cause. The licensee being in by contract, his right can only be terminated by consent or breach of some condition. Bingo Mining Co. v. Felton, 78 Mo. App. 210. A license is but a *proft a prendre*, and differs from an easement in that it can be held, apart from the possession of the land. Arnold v. Bennett, 92 Mo. App. at p. 159; Lindley on Mines, Sec. 860; Bainbridge (4 Ed.), 510; Fuhr v. Dean, 26 Mo. 116; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225.

<sup>3</sup> And it would not be a good defense to such action that the licensee

after the execution of the license, the licensor could not revoke the license without compensating the licensee for such improvements and expenditures as he had made thereunder, less the damage resulting to the licensor by reason of the breach;<sup>1</sup> and even under a parol license, the licensee would have a perfect right to enter and remove his property and would not be deemed a trespasser therefor.<sup>2</sup>

§ 253. **For failure to work mine.**— One of the most frequent conditions in leases and agreements creating licenses to mine, by which the rights of the miner are forfeited, is the condition requiring a regularity of work upon the mine or property let and such a degree of skill and prudence as is usually met with in undertakings of a similar nature.<sup>3</sup> Such conditions are deemed absolutely essential for the protection of the owner of the land and are not regarded with such general disfavor by the courts as other conditions working forfeitures, which are less beneficial in their results.<sup>4</sup> For the breach of such a condition by the miner, whether the breach arises from the

came lawfully into possession under the license. *Lockwood et al. v. Lunsford*, 56 Mo. 68. But see *Dark v. Johnson*, *supra*; *Fuhr v. Dean*, 26 Mo. 116.

<sup>1</sup> *Tiedeman R. P.*, § 53; *Giles v. Simmonds*, 11 Gray. 444; *Whitmarsh v. Walker*, 1 Metc. 316. Under the Missouri statute the mining rules and regulations of the landowner, signed by the miner, furnish the contract between the parties and determine the rights and obligations of the licensee. *Lowe v. American Zinc & Co.*, 89 Mo. App. 680; *Rochester v. Mining Co.*, 86 Mo. App. 447; *Springfield F. & M. Co. v. Cole*, 130 Mo. 1; *Arnold v. Bennett*, 92 Mo. App. 156.

<sup>2</sup> *Desloge v. Pearce*, 38 Mo. 599; 2 Amer. Lead. Ca. (3d Ed.), 697-699; *Sampson v. Burnside*, 13 N. H. 264.

<sup>3</sup> *Lewis v. Fothergill*, L. R. 5 Ch. App. 103; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Adams v. Oreknob Copper Co.*, 7 Fed. Rep. 634.

<sup>4</sup> *Lunsford v. Lead Co.*, 54 Mo. 426; *Garvey v. Gunther*, 51 Mo. App. 545.

careless and unskillful nature of the work,<sup>1</sup> or from a failure to work the mine within the stipulated time,<sup>2</sup> the owner could enter and work a forfeiture of his rights and the courts would protect him in so doing. But there must have been a clear breach, under the agreement, before the rights of the miner could be thus terminated, and if he had acted under the same in good faith, even though his acts might technically amount to a breach of the condition, unless the owner of the land would be occasioned unusual damage or expense thereby, the courts would probably construe the agreement most favorably to the rights of the miner, and, if such a construction were possible, give the owner damages for the injury suffered, in lieu of the forfeiture, and place both parties as near in *statu quo* as the circumstances of the case would permit.<sup>3</sup>

<sup>1</sup> A covenant to work mines in a skillful manner applies only to opened mines. *Quarrington v. Arthur*, 10 M. & W. 385; 11 L. J. (N. S.) Ex. 418; B. & W. L. C., p. 428.

<sup>2</sup> *Adams v. Oreknob Copper Co.*, 7 Fed. Rep. 634; 15 Am. & Eng. Enc. of Law, 616; B. & W. L. C. 430 *et sub.* But equity will not enforce such covenants. *Wheatley v. West. Coal Co.*, 9 Law Rep. Eq. 538. See as to occasional entry to save from forfeiture, *Davis v. Moss*, 38 Pa. St. 346.

<sup>3</sup> *Meyers v. Tiley*, 32 Penn. 267; B. & W. L. C. 438; *Tiley v. Meyers*, 25 Pa. 897; *Harkness v. Burton*, 39 Iowa, 101. And see *Galey v. Kellerman*, 123 Pa. St. 491. "Where a contract allowing plaintiff the right to mine for oil on defendant's premises provided that the grant should be void in case no well was begun and prosecuted with due diligence within four months, it was not error to refuse to instruct that if the plaintiff, before the termination of the lease, hauled lumber on defendant's land for the purpose of beginning the well, such act was a beginning of the well, within the contract; as, the plaintiff having hauled lumber on the premises the day before the contract expired, it was not for the court to determine such question as a matter of law, and it was properly left to the jury to decide, in connection with testimony as to the general understanding among persons engaged in boring oil wells as to when a well was begun." *Forney v. Ward*, 62 S. W. Rep. 108 (Texas, April, 1901).

§ 254. *Same — On the public land.* — As in the case of forfeitures resulting from the breach of covenants in contracts, statutes and rules prescribing forfeiture for failure to perform the annual labor and improvements required on mining claims upon the public land, are construed strictly by the courts.<sup>1</sup> Where a statute provides that an annual amount of labor must be performed on a mining claim in order to hold the same, and forfeiture is the penalty affixed for a violation of the statute, a failure to perform the requisite amount of work and labor leaves the claim subject to a relocation, providing the original locator does not preserve his rights by performing the work and labor required by the statute before the completion of the subsequent relocation.<sup>2</sup> No one, however, can take advantage of the failure of the original locator to perform the work and labor required by the statute in order to hold his claim, except a subsequent relocater, who has himself taken advantage of the default, and relocated the claim before the work and labor is performed, for the reason that forfeitures are looked upon with odium in the law.<sup>3</sup> Hence,

<sup>1</sup> *Van Schmidt v. Huntington*, 1 Cal. 70. As to mining custom, see *Coleman v. Clemens*, 28 Cal. 248; as to District rule, *Bell v. Bed Rock Co.*, 86 Cal. 214. As to statute, *Wade Am. Min. Laws*, § 80, p. 56, and cases cited.

<sup>2</sup> This is a provision by United States statute, R. S. U. S. for 1872, § 2324; *Wade Amer. Min. Laws*, § 80, p. 56; *Greydon v. Hood*, *Mor. Min. Rights* (4 Ed.), 65; *Wiseman v. McNulty*, 25 Cal. 230; *Bradley v. Lee*, 38 Cal. 362; *B. & W. L. C.*, p. 120 *et sub.* By statute in the United States (R. S. U. S., Sec. 2324), a co-owner's interest may be forfeited, on notice, for failure to contribute his portion of the work or money, and on such failure and notice his co-owners take his share. *Johnson v. Standard Co.*, 148 U. S. 360; *Turner v. Sawyer*, 150 U. S. 578; *Royston v. Miller*, 76 Fed. Rep. 50; *Brundy v. Mayfield*, 15 Mont. 201; *Elder v. Horseshoe Co.*, 9 So. Dak. 636; 20 Am. & Eng. Enc. Law (2 Ed.), 739.

<sup>3</sup> *Wade's Am. Min. Laws*, § 80, p. 56; *Wiseman v. McNulty*, 25 Cal. 230; *Bradley v. Lee*, 38 Cal. 362. As to effect of forfeiture for failure to



a statute requiring annual work and labor on a claim, will not be held to work a forfeiture of the claim unless a forfeiture is specially provided for by the statute, as a penalty for a failure to perform the work and labor required.<sup>1</sup>

§ 255. **Waste a ground for re-entry.** — Waste is defined to be any unlawful act, or omission of duty, resulting in permanent injury to the inheritance.<sup>2</sup> It is always a question of fact for the jury, and the determination of the question rests very materially upon the usages and customs of the community, the surrounding circumstances and the relation of the parties to the inheritance.<sup>3</sup> Where there is a provision, therefore, in a lease, reserving the right in the lessor to re-enter, in case the lessee commits waste, it is construed to mean such acts as would result injuriously to the inheritance,<sup>4</sup> and although there is a fixed valuation in the lease as to what injury would be construed waste, it would still be a question for the jury, as to whether the acts of the lessee could be so considered.<sup>5</sup> And where the acts of the lessee, in accordance with the provisions of the lease, are held to be an injury to the reversion, this would not, necessarily, constitute a forfeiture of the premises, or of the entire estate,

work, see *Duprey v. Williams*, 26 Cal. 309; *Strong v. Ryan*, 46 Cal. 33; B. & W. L. C., p. 221 *et sub.*

<sup>1</sup> *Bell v. Bed Rock T. M. Co.*, 36 Cal. 214; *McGarrity v. Byington*, 12 Cal. 427. But see, *contra*, *King v. Edwards*, 1 Mont. 235; *St. John v. Kidd*, 26 Cal. 263. For full discussion and review of these cases on forfeiture of claims on public land for failure to perform annual labor, see *Blanchard & Weeks Ld. Cas.*, pp. 221-222.

<sup>2</sup> *Tiedeman Real Property*, § 72; 2 Bl. Com. 124; *Bettinger v. Baker*, 29 Pa. St. 70; *Debrew v. Colfax*, 10 N. J. L. 128.

<sup>3</sup> *Tiedeman R. P.*, §§ 73, 74.

<sup>4</sup> *Taylor Land. & Ten.*, §§ 490; *Doe v. Bond*, 5 B. & C. 855.

<sup>5</sup> *Ante, idem.*

but only that portion of the property which was injured by the commission of the waste.<sup>1</sup> But where the lease provides for a forfeiture of the entire estate in case of the commission of waste, any act, either of the lessee, or an assignee of a portion of the premises, that would amount to an injury to the inheritance, would operate a forfeiture of the whole estate.<sup>2</sup> And where the lessee covenants that he will not cut or destroy any timber, growing on the demised premises, except for certain purposes, which are specified in the lease, and there is a provision for re-entry by the lessor, in case of the breach of any of the covenants by the lessee, on proof by the lessor that the lessee had cut timber for purposes other than those specified in the lease, the lessor would be entitled to enter on the demised premises, and after admitting that he had used timber for purposes other than those specified, the lessee could not avoid the consequence of such act, by showing that he had not taken more timber than he was authorized to take by the lease.<sup>3</sup>

§ 256. **How right to claim is waived.** — In all cases where the estate of a lessee, under the lease, is subject to forfeiture, if he fails to comply with certain provisions or to perform certain conditions of the lease, and thereupon the lessee does or suffers the prohibited thing, the lessor is held to waive his right to claim the forfeiture, so that he will never afterward be permitted to insist upon it, if he accepts payment for royalty that has subsequently accrued,

<sup>1</sup> *Taylor's Land. & Ten., supra*; *Jackson v. Tibbits*, 3 Wend. 341. But see *Whitwell v. Harris*, 108 Mass. 532.

<sup>2</sup> *Eyton v. Jones*, 21 L. T. (N. S.) 789; *Taylor's Land. & Ten.*, § 491.

<sup>3</sup> *Clark v. Cummings*, 5 Barb. 389; *Jackson v. Bronson*, 7 Johns. 227; *Taylor's Land. & Ten., supra*. And where lessor is already in possession the execution of a new lease is a sufficient notice of his election to claim the forfeiture. *Allegheny Oil Co. v. Bradford Oil Co.*, 20 Hun, 26.

or does any other act which the law would constitute a recognition of the continued existence of the tenancy.<sup>1</sup> And the lessor may, in many instances, by his overt acts, be afterward estopped to claim the right of forfeiture, as against the lessee, although his acts do not amount to an absolute recognition of the lessee's rights under the lease.<sup>2</sup> As where the lessor stands by and sees the lessee make subsequent discoveries and expenditures, without objection, which are much more valuable than the damages resulting from his breach.<sup>3</sup> On this doctrine, it has been held, where a lease provided for the boring of several mines, at stated intervals, the premises to be forfeited by the lessee for a failure to put down a certain mine, within the time stipulated, that the lessor had waived his right to insist on a forfeiture for a breach of this condition by his previous acquiescence in the lessee's failure to put down other preceding mines within the period prescribed.<sup>4</sup> But where there has been a clear breach of the condition by the lessee, the lessor will not ordinarily be estopped from claiming the forfeiture, unless his acts amount

<sup>1</sup> Taylor's Land. & Ten. 497; Maurice v. Millen, 26 Barb. 42; Bacon v. West. Tr. Co., 53 Ind. 229; Newman v. Rutter, 8 Watts, 51. It is the better doctrine that the royalty or rent, to constitute a waiver, must have occurred subsequent to the breach. Tiedeman R. P., § 277 note; Taylor, 497, note; Jackson v. Allen, 3 Cow. 220.

<sup>2</sup> Doe v. Allen, 3 Taunt. 78; Wilgus v. Whitehead, 89 Pa. St. 131; Doe v. Maux, 4 B. & C. 606; Taylor, § 498. Lessor will be held to waive forfeiture of oil lease where for six days he fails to give notice and the lessee, in the interim, makes extensive improvements. Lynch v. Fuel Gas Co., 165 Pa. St. 518; 30 Atl. Rep. 984. Mere delay on the part of the lessor is not, ordinarily a waiver of the right to claim a forfeiture. McKnight v. Kreutz, 6 M. M. R. 305.

<sup>3</sup> Doe v. Allen, 3 Taunt. 78; Taylor, § 498; Clark v. Hart, 6 H. L. Cas. 633; Hart v. Clark, 6 DeG. & M. G. 232. See also, where default is mutual, Doe v. Morris, 2 Taunt. 52; Mor. Min. Dig., p. 118.

<sup>4</sup> Duffield v. Hue, 129 Pa. 94; 47 Phil. Leg. Int. 248; 25 W. N. C. 32; 18 Atl. Rep. 566; Galey v. Kellerman, 123 Pa. 491; 16 Atl. Rep. 474.

to a recognition of the continued existence of the lease;<sup>1</sup> and if the clause working the forfeiture results from a failure to pay royalty within the stipulated time, the receipt of royalty by the lessor, after knowledge of the breach, is not held to constitute a waiver of his rights to claim the forfeiture, provided the causes of the forfeiture continue to exist.<sup>2</sup> And in all cases where the lessee attempts to show a waiver of the forfeiture, by producing receipts for the payment of royalty, given him subsequent to the breach, by the lessor, the receipts do not create an estoppel as to the correctness of the amount paid;<sup>3</sup> and they will not amount to a waiver, unless given by the lessor with full knowledge of the facts.<sup>4</sup>

§ 257. **Equitable relief against re-entry.** — Equity will not grant relief in all cases of forfeiture resulting from a lessee's breach, and where the demised premises are used for purposes other than those agreed upon, or where a way is put through the premises, contrary to an express covenant, the lessee cannot claim relief from the consequences of his acts by recourse to a court of equity.<sup>5</sup> And, generally, whenever the breach results from a willful failure or neglect of the lessee to perform his covenant, and when the injury resulting to the lessor from

<sup>1</sup> Taylor's Land & Ten., § 498 *et sub.*; Doe v. Allen, 3 Taunt. 78; Henry v. Tupper, 29 Vt. 56.

<sup>2</sup> Taylor's Land. & Ten., § 500; McGlynn v. Moore, 25 Cal. 384; Farwell v. Easton, 63 Mo. 446.

<sup>3</sup> Taylor's Land. & Ten. 497; Welder v. Ewbank, 21 Wend. 587; Greenl. on Evid., § 305, p. 395, *et sub.*

<sup>4</sup> Dunham v. Haggerty (Pa.), 1 Cent. 600; Gornet v. Finney, 40 Mo. 449; Jackson v. Schultz, 18 Johns. 174; Bank v. Mitchell, 73 N. Y. 406; Taylor, § 497, p. 83.

<sup>5</sup> Taylor Land. and Ten., p. 82, § 496. Equity, generally, will neither relieve against or enforce a forfeiture, but will leave the parties to their legal remedies. Tiedeman R. P., § 279, p. 188.

the breach, is not susceptible of pecuniary compensation, a court of equity would refuse to grant relief from a forfeiture incurred by such breach.<sup>1</sup> But where the breach occurs through a mistake of the lessee, or by reason of an accident, which it was not his legal duty to have avoided, a court of equity would interfere to prevent a forfeiture of the premises, and the equivalent of the injury in money would be decreed to compensate the lessor for the damage resulting from the breach.<sup>2</sup> The clause of re-entry is inserted principally for the lessor's benefit, as a means of enabling him to enforce the forfeiture, and although the doctrine of compensation does not apply in cases where the lessor's injuries are not a matter of computation, where the extent of the injuries can be calculated, courts both of law and equity would interfere to protect the lessee from the forfeiture, even though there had been an entry by the lessor, and all the common law formalities of a forfeiture had been complied with.<sup>3</sup>

<sup>1</sup> Blsp. Prin. Eq. 181; *Davies v. Morton*, 2 Ca. in Ch. 127; *Rolfe v. Harris*, 2 Price, 206; *Cage v. Russell*, 2 Vent. 253; *Taylor's Land. & Ten.*, § 296.

<sup>2</sup> *Baxter v. Lansing*, 7 Paige, 350; *Gregory v. Wilson*, 9 Hare, 683; *Nokes v. Gibben*, 3 Drew. 681; *Taylor's Land. & Ten.*, *supra*; *Warner v. Bennett*, 81 Conn. 488; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Williams v. Angell*, 7 R. I. 152. Equity will relieve against forfeiture resulting from failure to pay money, unless lessees conduct has been inequitable. *Sunday Lake Co. v. Wakefield*, 72 Wis. 204; 16 M. M. R. 97.

<sup>3</sup> *Goodright v. Noright*, 2 W. Bl. 746; *Story's Eq.*, § 1814; *Hill v. Barclay*, 16 Ves. 402; *Wilson v. Jones*, 1 Bush, 178; *Baxter v. Lansing*, 7 Paige, 350; *Taylor's Land. & Ten.* 495. For relief from forfeiture in equity, see *South. Penn. Oil Co. v. Edgell* (W. Va. 1900), 37 S. E. Rep. 596.

## CHAPTER XVII.

### MINING CONTRACTS.

**SECTION 258. Mining contracts in general.**

- 259. Title bonds.
- 260. Agreements to prospect for mineral.
- 261. Agreements to lease.
- 262. Contract to purchase.
- 263. Covenant to work mines.
- 264. Contract for sale of ore.
- 265. Lease construed as contract of sale.
- 266. Assignment of royalty.
- 267. Time of the essence of mining contracts.
- 268. Contracts of mining partnerships.
- 269. Contracts of mining corporations.
- 270. Contract to test for mineral.
- 271. Contract to drain mines.
- 272. Construction aided by custom.

§ 258. **Mining contracts in general.** — The law of contracts in general applies to mining, the same as to every other branch of business known to the law, and as far as the fundamental principles are concerned, there is no distinction in the application of the law between mining and other species of contracts.<sup>1</sup> But although the elementary principles in the law of contracts apply equally to mining agreements, there are some reasons for a separate treatment of this branch of the law, in its relation to the subject of mining transactions, for while these elementary principles can be found in any reliable text-book on the law of contracts, there are many agreements entered into by persons in this vocation, which cannot be found in the ordinary work on contracts, for the reason that they are

<sup>1</sup> Wade's Amer. Min. Laws, § 155, p. 221; MacSwiney on Mines, chap. 2.

peculiar in their operation, and as the law consists principally of the adjudged cases on the subject, they could not be incorporated in a general work on contracts, but are left for the consideration of writers on this subject alone.<sup>1</sup>

§ 259. **Title bonds.** — The bond given by a miner upon public land, for the conveyance of his claim, upon the performance of the conditions of the bond, are similar in some respects to a bond for a deed,<sup>2</sup> used frequently in the conveyance of real estate.<sup>3</sup> These bonds are in the nature of optional contracts.<sup>4</sup> The seller therein agrees to convey the title to his claim, within a certain time, for the price agreed upon, provided the purchaser, within the time stated, shall elect to buy the claim, or perform the conditions of the bond.<sup>5</sup> The seller can withdraw his offer any time before it is accepted, or the purchase price is tendered by the purchaser,<sup>6</sup> and in order to bind either party to the agreement, the option of the purchaser must be based upon a valuable consideration.<sup>7</sup> If it is not based upon a valuable consideration, there must be an unconditional promise to purchase,<sup>8</sup> and where the option is

<sup>1</sup> Where mining operations are conducted under the "register system," the rules become a part of the contract between the owner and the miner. *Empire Zinc Co. v. Freeman*, 75 Mo. App. 534; *Kirk v. Mattler*, 140 Mo. 28; *Garver v. Gunther*, 51 Mo. App. 545.

<sup>2</sup> *Wade's Am. Min. Laws*, §§ 154, 155; *Mor. Min. Rts.* (10 Ed.) 228.

<sup>3</sup> *Tiedeman on R. P.* 236.

<sup>4</sup> *Wade's Am. Min. Laws*, § 155, p. 221. *Finerty v. Fritz*, 1 M. M. R. 488.

<sup>5</sup> *Smith v. Reynolds* (U. S. Ct. Dist. Col.), 1 Col. Law Rep. 89.

<sup>6</sup> *Smith v. Reynolds*, *supra*.

<sup>7</sup> *Wade's Am. Min. Laws*, §§ 154-155, pp. 220-221.

<sup>8</sup> "The only title bonds which will be held valid and binding on either party are such as contain an unconditional promise to purchase, or where there is a consideration paid in money or work on the claim for the option." *Wade Am. Min. Law, supra*; *Mor. Min. Rts.* (10 Ed.) 228.

founded on the payment of a forfeit by the purchaser, in case he fails to consummate the bargain within the time stated, he could not be held to pay the forfeit;<sup>1</sup> and if there had been a part payment on the same, the part paid would be construed as the consideration for his option and the seller would not be permitted to recover the balance.<sup>2</sup>

§ 260. **Agreements to prospect for minerals.** — It is quite common, in the mining districts, for persons to enter into agreements to prospect for minerals, and in case the ore is found, on the tract of land to which their operations are confined, to locate a claim thereon in the joint names of the parties who participate in the mining adventure.<sup>3</sup> When mineral is discovered, under such an agreement, the parties to the contract are considered tenants in common of the mines developed and each is entitled to his share of the profits under the contract.<sup>4</sup> Those, however, who have laid idle and failed to contribute their share of the expense during the operations and prospecting, and those who have abandoned the contract, cannot come in for their share of the profits after the discovery of ore;<sup>5</sup> nor can the parties to the original contract claim the benefit of discoveries

<sup>1</sup> *North Georgia Min. Co. v. Lattimer*, 51 Ga. 67; *Gordon v. Swan*, 43 Cal. 564. See also *Finerty v. Fritz*, 1 M. M. R. 438.

<sup>2</sup> *Ante, idem*; *Luckhart v. Ogden*, 30 Cal. 547.

<sup>3</sup> *Wade's Am. Min. Laws*, § 155, pp. 221-2. But such contracts, like agreements to work mines, cannot be the foundation for an action of specific performance. *Fry Spec. Per. Con.*, p. 65; *Filnt v. Brandon*, 8 Ves. 159. See *Mor. Min. Rts.* (10 Ed.) 247.

<sup>4</sup> *Wade's Amer. Min. Laws, supra*; *Henderson v. Allen*, 28 Cal. 519. See, as to contracts to test land for a per cent of the ore found and the legal phase of such agreements, *Cook v. Andrews*, 36 Ohio St. 174; *Leavers v. Cleary*, 75 Ill. 349; *Woodworth v. McLean*, 97 Mo. 325; 7 Fed. Rep. 634. For contract to seek for coal and when found, to pay for same, see *Oliphant v. Woodman Coal Co.*, 15 M. M. R. 365.

<sup>5</sup> *Wade's Am. Min. Laws, supra*; *Settembre v. Putnam*, 30 Cal. 490.



made by their prospector on a different tract of land<sup>1</sup> or under a new contract which he had entered into with different parties.<sup>2</sup> But after discoveries are made, if the land is located under the original contract, an action for specific performance could be maintained to compel the party locating in his own name, to make conveyances of the shares due the other parties under the contract.<sup>3</sup>

§ 261. **Agreements to lease.** — An agreement to lease land for mining purposes, if founded on a valuable consideration, and in the nature of a valid, subsisting contract, will be supported by the courts,<sup>4</sup> and if the party promising to lease, afterwards refuse to execute the lease, the promisee under the contract can maintain an action for the specific performance of the same, or recover damages in an action against the promisor for the breach.<sup>5</sup> In an action for

<sup>1</sup> *Johnstone v. Robinson*, 2 Col. Law. Rep. 110.

<sup>2</sup> *Ante, idem.* Wade's Am. Min. Laws, pp. 221-222.

<sup>3</sup> *Sears v. Collins*, 1 Col. Law. Rep. 489; *Welland v. Huber*, 8 Nev. 203. "A contract by several to purchase jointly an interest in a mine, is for the benefit of all, and if one party takes the title in his own name, he may be compelled to convey to the others." Wade's Am. Min. Laws, p. 222; *First Nat. Bank v. Bissell*, 1 Col. Law. Rep. 158; *Settembre v. Putnam*, 30 Cal. 490. "A verbal contract between A. and B., by which A. agrees to go upon the public domain and search for mineral deposits, being supplied at the cost of B., the discoveries to be located for the joint benefit of the two, violates no provision of the Statute of Frauds." *Murley v. Ennis*, 2 Colorado, 304; M. M. D. 213.

<sup>4</sup> *Morgan v. Morgan*, 14 L. J. (N. S.) C. P. 5; *B. & W. L. C.*, p. 417. Whether an instrument is a lease or a contract is properly left to a jury. *Moore v. Miller*, 8 Pa. St. 283.

<sup>5</sup> *Fry on Specific Performance of Contracts*, 103 *et sub.* But the promise to lease must be reasonably certain and definite before the courts would enforce such a contract. *Fry Spec. Per. of Con.*, p. 165 *et sub.* And where in the sale of a piece of land, there was a stipulation that royalty of so much per ton should be paid by the purchaser to the vendor on all mineral found in the land, although plainly intended as a lease, the court would not enforce such a contract, there being nothing

damages for the breach of such a contract, the measure of damages would be the value of the privilege or right that the promisee held under the contract,<sup>1</sup> and in estimating the amount of damages, the quantity of the mineral, or the thickness of the veins, the depth of the mineral below the surface, the amount of royalty to be paid, and all other matters going to show the value of the promisee's rights under the contract, should be taken into consideration.<sup>2</sup> But the rule for calculating the damages is not very reliable, and the amount of damages recoverable must depend upon the facts and circumstances of each particular case and in estimating the damages a reasonable value should be placed upon the promisee's right and no speculative value of the profits should be considered in determining the amount to be recovered.<sup>3</sup>

§ 262. **Contract to purchase.** — Contracts to purchase mines, or mineral property, are also supported by the courts,<sup>4</sup> and provided the seller can show a precise compliance with the conditions of the contract on his part, if the promise to purchase is based upon a valid subsisting contract, the action of specific performance will lie to compel the pur-

to guide the court, except the rate of royalty, as to the intention of the parties. *Williamson v. Wooten*, 8 Drew. 210; *Fry Spec. Per. of Con.*, p. 170 and cases cited.

<sup>1</sup> *Chambers v. Brown*, 69 Iowa, 213; 15 Am. & Eng. Enc. of Law, p. 599.

<sup>2</sup> *Ante, idem.* As to the status of lessee's rights before entry under such a contract, see *Austin v. Huntsville Coal Co.*, 72 Mo. 535.

<sup>3</sup> *Chambers v. Brown, supra.* "A party undertaking to lease mines, having no authority at the time so to do, but afterwards acquiring the requisite power, is bound then to fulfill his contract. *Carne v. Mitchell*, 15 L. J. Ch. 287. But such contract cannot be enforced against a limitation imposed upon the power." *Id.* M. M. D. 189.

<sup>4</sup> *Blanchard & Weeks Ltd. Cas.* 344-345; *Curling v. Flight*, 5 Hare, 244; s. c. 6 *Id.* 41; 2 *Phillipps*, 614.

chaser to perform his part of the agreement,<sup>1</sup> or damages suffered on account of the breach, which would ordinarily be the difference between the contract price and the market value of the mine, would be awarded to the seller.<sup>2</sup> The statute of frauds, however, applies to agreements to purchase mines the same as to other contracts, where the title to real estate is involved,<sup>3</sup> and if the contract is in substance an agreement to purchase land, in order to be valid, the contract must have been reduced to writing and contain the other statutory requirements, to take the contract beyond the statute.<sup>4</sup> And where the agreement to purchase is made by several parties, and they are to take joint interests in the mine, or mining property, the same rules prevail as when an agreement is made by two or more parties to prospect for minerals;<sup>5</sup> and if the title to the property is taken in the name of any one of the purchasers,

<sup>1</sup> *Curling v. Flight*, *supra*; *Fry Spec. Per. Con.*, p. 418; *Parker v. Frith*, 1 S. & S. 199; *City of London v. Mifford*, 14 Ves. 58. See Chapter, *Specific Performance of Mining Contracts*.

<sup>2</sup> *Bisp. Prin. Eq.*, § 864; *Smaltz's App.*, 99 Pa. St. 310; *Truley v. Aiker*, 1 Gr. Cas. 83; *Dalzell v. Crawford*, 1 Pars. Eq. 37.

<sup>3</sup> *Felger v. Coward*, 35 Cal. 650; *St. John v. Kidd*, 26 Cal. 269; *Patterson v. Keystone Min. Co.*, 30 Cal. 360; *Goddier v. Fett*, 30 Cal. 481; *B. & W. L. C.*, p. 441 *et sub.* "A contract whereby defendant agreed to sell, and plaintiff agreed to buy, all the oil 'they may require for their own use for a period of twelve months from the date hereof,' was not void for want of mutuality." *Manhattan Oil Co. v. Richardson Lubricating Co.*, 118 Fed. Rep. 928. "Where a contract for the sale of certain coal is in writing and free from ambiguity, it is the duty of the court to construe it, and to instruct the jury accordingly." *Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.*, 66 S. W. 373 (Ky. 1902).

<sup>4</sup> But this was not the rule in California prior to the Act of 1860. See *Patterson v. Keystone M. Co.*, 23 Cal. 575; *Goller v. Fett*, 30 *Id.* 481. And the transfer is good in the absence of a seal. *Draper v. Douglas*, 23 Cal. 347; *Crary v. Campbell*, 24 Cal. 634.

<sup>5</sup> *Gore v. McBrayer* (18 Cal. 582), where a contract by several to purchase mines was held a mining partnership and the agreement within the statute.

the other parties to the contract can compel him to convey to them their interest in the property,<sup>1</sup> and he would be considered as trustee of a resulting trust of the shares of the different parties to the contract.<sup>2</sup>

§ 263. **Covenants to work mines.** — It is quite frequent for the lessor or licensor of mining property to impose upon the lessee or licensee, in the instrument of demise, or by means of certain rules governing their mining operations, the obligation to perform and prosecute his work in a "skillful and workmanlike manner."<sup>3</sup> The words sometimes used are that he will continue work, "with due diligence and without delay,"<sup>4</sup> but any similar language,

<sup>1</sup> Wade's Amer. Min. Laws. p. 222; *First Nat. Bank v. Bissell*, 1 Col. Law. Rep. 158.

<sup>2</sup> Bisp. Prin. of Eq., § 80 and cases cited.

<sup>3</sup> *Blanchard & Weeks Ltd. Cas.*, p. 440; *Abinger v. Ashton*, 9 Mook Eng. R. 585; L. Rep. 17 Eq. 358. Custom will control mode of working in the absence of express stipulations. *Ante, idem.* As to what will constitute working in a "workmanlike manner," see *Lewis v. Fothergill*, L. R. 5 Ch. App. 103; *Carr v. Benson*, L. R. 3 Ch. App. 524; *Quarrington v. Arthur*, 10 M. & W. 335. "Upon a covenant to work in 'a proper and workmanlike manner,' the court will not take either extreme of meaning which may be contended for upon those words, but will look to the lease to see how far the landlord has protected himself by the special terms of the contract." *Lewis v. Fothergill*, L. R. 5 Ch. App. 103; M. M. D. 104. "Where a lessee of coal mines covenants by the terms of his lease to work the same during the continuance of his lease in a good and workmanlike manner, he is liable for a breach of his covenant, notwithstanding it may be beyond his power to perform it; but if the coal mines become exhausted, that will excuse him from any further performance." *Walker v. Tucker*, 70 Ill. 527. M. M. D. 186.

<sup>4</sup> *Lewis v. Fothergill*, *supra*. "The defendant agreed to grant the plaintiff a coal lease for twenty-one years; the only rent reserved was dependent on the quantity raised, and was made payable quarterly. The court held, on the construction of the contract, that the plaintiff was bound to commence working immediately and to proceed continuously." *Sharp v. Wright*, 28 Beav. 150; M. M. D. 192. "A covenant to mine without delay which is broken by a fraudulent delay, allows of

expressing the same intent, would have an equivalent effect, and if subscribed to by the lessee or licensee, the courts would regard such a promise as a valid subsisting contract, and one necessary for the protection of the lessor or licensor.<sup>1</sup> Under such a contract if the lessee should fail to prosecute his work as provided for, the lessor could maintain an action of damages for the breach,<sup>2</sup> and recover the amount which he should have received, if the lessee had prosecuted the business with due diligence, less the cost of operating the mine and whatever ore or royalty the lessor may have actually received;<sup>3</sup> and to such an action it is not a valid defense that ore could not be profitably worked, unless the contract stipulated that the mine should be worked only when profitable.<sup>4</sup> But where the lessee only agrees to

the interposition of a court of chancery." *Green v. Sparrow*, 8 Swanst. 408; M. M. D. 191. "But a covenant in a lease of a colliery to work continuously, where not expressed, will not be implied." *Jegon v. Vivian*, L. R. 6 Ch. App. 742; M. M. D. 194. A covenant to commence by a day certain is of the essence of the contract. *Barker v. Dale*, 3 Lgh. 190. "Where there is a contract for work partially executed, recovery for the actual work can be had under a *quantum meruit*, if the failure to complete the work is not the fault of the plaintiff." *Barrett v. Raleigh Coal & Coke Co.*, 41 S. E. 220.

<sup>1</sup> *Walker v. Tucker*, 70 Ill. 527. But such a contract cannot be specifically enforced by the courts. *Fry Spec. Per. of Con.*, p. 65; *Flint v. Brandon*, 8 Ves. 159; *Wheatley v. Westminster Coal Co.*, 9 Law Rep. Eq. 538; B. & W. L. C., p. 481.

<sup>2</sup> *Smith v. Darby*, L. R. 7 Q. B. 716. But see, where mines were not worked at all, *Quarrington v. Arthur*, 10 M. & W. 335; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; and *Lewis v. Fothergill*, *supra*, where defendant was held to have operated in "a workmanlike manner."

<sup>3</sup> *Wheatly v. Westminster Brymbo Co.*, L. R. 9 Eq. 538; *Fisher v. Milliken*, 8 Pa. St. 111; *Edwards v. Rees*, 7 Carr. & P. 340; *Granby M. & S. Co. v. Turley*, 61 Mo. 375; *Likens Valley C. Co. v. Dock*, 62 Pa. St. 232. And see as to recoupment of damages, *Williams v. Schmidt*, 54 Ill. 206.

<sup>4</sup> See, for a full exposition of the law on this branch of the law of mining contracts and the consequence of their breach, *Blanchard & Weeks*

continue work and pay the stipulated royalty, in case he can find a paying vein of ore, the lessor could not recover, on a breach of the contract, for a failure of the lessee to mine and pay the stipulated royalty,<sup>1</sup> for his liability under the contract did not exist until the mineral had been found.<sup>2</sup> And nothing but nominal damages could be recovered, in case the lessee, under such a contract, should fail entirely to prospect for mineral,<sup>3</sup> for his liability does not accrue until the mineral is found, and while its existence is un-

**Leading Cases**, where the authors among other things say: "To state the rule in another form, in view of the many vicissitudes to which mines are subject, the mere fact of 'unworkability to profit' affords no ground whatever for reducing or throwing up a lease of minerals. There is in such case no legal warranty implied on which the lessee can rely." For interesting discussions by the other judges, see pp. 120 to 124. *Gowan v. Christie*, 5 Moak Eng. R. 114; Law Rep. 2 Scotch Ap. 273.) B. & W. L. C., p. 480. But see *Murdock v. Fullerton* (cited in 5 Moak's Eng. R. 118, where a mere thin seam was held a failure of the landlord's warranty that the land contained "workable coal." An unexpected inferiority of a coal vein, by which it is rendered more expensive to mine than it will bring upon the market, held to excuse lessee from covenant to mine a given quantity. *Givens v. Providence Coal Co.* (Ky. 1901), 60 S. W. 804. But where lease provides for fixed rent for use of coal shaft and after exhaustion of the coal in the mine, lessee continues to use shaft to hoist coal from other mine, he is liable for the fixed rent, as though he still mined the ore and raised it from the shaft. *Lennox v. Vandalla Coal Co.* (Mo.), 59 S. W. 242.

<sup>1</sup> *Clifford v. Watts*, L. R. 5 C. P. 577; distinguishing *Marquis of Bute v. Thompson*, 13 M. & W. 487; s. c. 14 L. J. Ex. Ch. 95. "Where the agreement was to work a coal mine as long as it was fairly workable, and there were coals in the mine, but of such a kind that it did not pay to work it—the court said the lessees were not obliged to go on working so long as there was any coal to be found, and that, under the words 'fairly workable,' they were not obliged to work at a dead loss." *Jones v. Shears*, 7 C. & P. 846; B. & W. L. C. 430 *et sub.* See *McCahan v. Wharton*, 121 Pa. 424; 46 Phila. Leg. Int. 169; 22 W. N. C. 491; 15 Atl. 615.

<sup>2</sup> *Ante, idem.* *Quarrington v. Arthur*, 10 M. & W. 835.

<sup>3</sup> *Foley v. Adderbrook*, 13 M. & W. 173; *Bell v. Truitt*, 9 Bush (Ky.), 257; *Smith v. Darby*, L. R. 7 Q. B. 716.

known, the value of the mineral could but be a mere matter of conjecture.<sup>1</sup>

§ 264. **Contract for sale of ore.** — When minerals have once been severed from the soil they are considered personal property, and the same rules prevail in regard to them, as obtain in regard to other species of personalty.<sup>2</sup> In a sale, or contract for the sale of mineral, if of sufficient value to bring the agreement within the statute of frauds, the contract to be binding must be in writing, or something in earnest given to bind the bargain.<sup>3</sup> Where a person agrees to sell ore prospectively to be taken from the

<sup>1</sup> *Quarrington v. Arthur, supra*. Covenant to mine given quantity enforced in following cases: *Clifford v. Watts*, L. R. 5 C. P. 577; *Price v. Nicholas* (U. S.), 4 Hughes, 616; *Watson Coal Co. v. Casteel*, 73 Ind. 296; *VanMeter v. Chicago Co.*, 88 Iowa, 92; *Plummer v. Hillside Co.*, 160 Pa. St. 488; *Rallbeck v. Anthony*, 78 Wis. 572; 20 Am. & Eng. Enc. Law (2 Ed.), 779. "A coal mine lease provided that the lessee should pay a fixed sum for every ton of clean, merchantable coal, exclusive of culm or mine waste which would pass through a half-inch mesh: Held, that though the lessee was not bound, under the contract, to pay for the culm or mine waste, if it did in fact take it it could raise no question of its merchantability, but must pay for it at the same rate agreed to be for the clean, merchantable coal." *Genet v. President &c. of Delaware & H. Canal Co.*, 75 N. Y. S. 553; N. Y. Sup. 1902. "Where a coal mine leased by defendant had been worked for some time prior to the lease, and defendant sent an expert to examine it, so that both parties were in possession of facts as to the nature and character and probable output of the mine, and the contract fixed a minimum amount which defendant was required to mine or to pay royalty on, and the testimony showed that defendant worked several mines where the output was greater than the minimum fixed in the contract, the royalty was liquidated damages, and not a penalty." *Coal Creek M. & M. Co. v. Tenn. C. & I. Co.* (Tenn.), 62 S. W. Rep. 162 (1901).

<sup>2</sup> *Knowlton v. Culver*, 1 Chand. (Wis.) 214; *Green v. Ashland Iron Co.*, 62 Pa. St. 97.

<sup>3</sup> See as to construction of 17 Sec. and Amer. Cases, *Benj. on Sales*, pp. 119-120; *Pattison's App.*, 61 Pa. St. 294; *White v. Foster*, 102 Mass. 375.

ground, if the contract specifies a certain grade of ore or a fixed amount to be delivered at some stated time, the seller will be held to a strict compliance with the conditions imposed by the contract,<sup>1</sup> and if he violates any of the conditions of the contract he cannot afterward claim that he is released from the agreement because the purchaser failed to pay the stipulated price for the ore delivered,<sup>2</sup> for the purchaser is entitled to rely upon the performance of the contract by the seller, and he could not be made to pay the full contract price for ore that was inferior in quantity or quality to that contracted for.<sup>3</sup> But the seller cannot be held to conditions that are not imposed by the contract,<sup>4</sup> and except as regards his right or title to the ore sold, there can be no implied warranty imposed

<sup>1</sup> *Ege v. Kaufman*, 1 Watts & S. 120. See, for construction of contract to supply coal, *Wood v. Copper Miners*, 7 C. B. 906; *Winslow L. & Co. v. Leonard*, 24 Pa. St. 14. But a contract to furnish a specified amount of ore is entered into with reference to the capacity of the mine at that time and the purchaser could not demand a greater amount than the contract specified or the mine could produce. *Rutland M. Co. v. Ripley*, 10 Wall. 339; *Pringle v. Taylor*, 2 Taunt. 150. In the sale of coal to be found and the payment unconditionally of a specified sum per annum the discovery of coal is not a condition precedent to the maturity of the annual amount to be paid. *Jewett v. Spencer*, 1 Ex. 647; 17 L. J. Ex. 367; reversing *a. c.* 15 M. & W. 662. Purchaser cannot refuse to take according to contract. *Chapman v. Briggs Iron Co.*, 6 Gray, 330.

<sup>2</sup> *Ege v. Kaufman*, 1 Watts & S. 120. Where the ore is to be delivered at a certain time the party need not take it if it is not so delivered. *Neldon v. Smith*, 36 N. J. L. 148. And that there was a shortage in quantity would be a good defense to purchase price. *Eckle v. Murphy*, 15 Pa. St. 128.

<sup>3</sup> *Ante, idem.* *Eckle v. Murphy, supra.*

<sup>4</sup> *Rutland M. Co. v. Ripley*, 10 Wall. 339. And where the ore is to be mined with tools to be furnished by the purchaser, the seller is only bound to furnish such an amount as he can reasonably do with the tools furnished, and he would not be responsible if he used reasonable diligence. *Campbell v. Gates*, 10 Pa. St. 483.



upon him, concerning the quantity or quality of the mineral.<sup>1</sup>

§ 265. **Lease construed as contract of sale.** — It frequently happens that instruments, which on their face purport to be nothing but leases, or ordinary licenses to mine, are construed by the courts as absolute contracts of sale, operating as valid conveyances of the title to the minerals to be mined thereunder.<sup>2</sup> And this, notwithstanding the parties may have contracted as lessor and lessee or licensor and licensee.<sup>3</sup> If the lease or license gives the grantee the exclusive right to take the mineral from the premises, upon payment of a stipulated price, it will operate as an absolute sale of the mineral,<sup>4</sup> and if a license, the privilege to take the mineral could not afterwards be revoked, but the licensee,

<sup>1</sup> *Johnson v. Mendenhall*, 9 W. Va. 112. And a mere statement or description of the quality is not a warranty. *Carondelet Iron Works v. Moore*, 78 Ill. 65. And this rule applies as well to sales of stock as to ore. *Renton v. Maryatt*, 21 N. J. Ch. 123. But a warranty may be inferred from terms of contract. *Warren v. Phila. C. Co.*, 83 Pa. St. 437. A warranty may arise from the purpose of the purchase. *Port Cambon Iron Co. v. Graves*, 67 Pa. St. 150. As to warranty by comparison, see *Pearson v. Martin*, 88 Wis. 265; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 118 Fed. Rep. 256 (U. S. C. C. A., W. Va., 1902); *Hercules Coal & Min. Co. v. Central Inv. Co.*, 98 Ill. App. 427; *Excelsior Coal Min. Co. v. Virginia Iron & Coal Co.*, 66 S. W. 373.

<sup>2</sup> *Kingsley v. Hillsdale Coal & Iron Co.*, 144 Pa. 613; 1 Pa. Adv. R. 235; 29 W. N. C. 368; 23 Atl. Rep. 250; *Hope's App. (Pa.)*, 29 W. N. C. 365.

<sup>3</sup> See *Re Lazarus's Estate*, 1 Pa. Adv. R. 238; 29 W. N. C. 372; 6 Kulp, 383; 145 Pa. 1; 23 Atl. 372; *Kingsley v. Hillsdale Coal & I. Co.*, 144 Pa. 613; 1 Pa. Adv. R. 235; 29 W. N. C. 368; 23 Atl. 250.

<sup>4</sup> *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371; 25 N. E. Rep. 795; rev'g 34 Ill. App. 512. "A grant of a mine right under which the grantee is authorized to remove and sell for his own benefit all the coal contained in a tract described, is a sale, and not a mere lease of the coal." *Kingsley v. Hillsdale Coal & I. Co.*, 144 Pa. 613; 1 Pa. Adv. R. 235; 29 W. N. C. 368; 23 Atl. 250. "And the exclusive right to mine carries with it the right to the possession, so far as necessary for mining, even as against the owner himself." *Benevides v. Hunt*, 79 Tex. 385.

in equity, would be invested with the title to the ore.<sup>1</sup> But in order to be construed as a contract of sale, the instrument must contain words sufficient to transfer the title to the minerals,<sup>2</sup> and for the contract to operate as an absolute sale of the minerals, where the grantor, under the contract, is a mining corporation, the contract must have been ratified by the stockholders,<sup>3</sup> or contain the other statutory requirements for a conveyance by a corporation;<sup>4</sup> and if there are any conditions in the contract to be performed by the purchaser, before he can enjoy the title to the ore, the same will not pass until these conditions have been performed.<sup>5</sup>

§ 266. *Assignment of royalty.* — The rent or royalty, payable under a mining lease, can be assigned the same as an open account,<sup>6</sup> but such assignment, in law, does not

<sup>1</sup> "Under a written agreement, not under seal, to grant the right of digging all the ore on the lands, the grantee does not take a mere revocable license, but is in equity invested with the title to the ore." *Fairchild v. Dunbar Furnace Co.*, 128 Pa. 485; 47 Phila. Leg. Int. 424; 18 Atl. 443. "An instrument granting a right to mine coal in and to remove it from the lessor's land, although called a lease, is a grant of an interest in the land itself, and not a mere license to take the coal." *Hope's Appeal* (Pa.), 29 W. N. C. 365; *Re Lazarus's Estate*, 145 Pa. 1; 1 Pa. Adv. R. 288; 29 W. N. C. 372; 6 Kulp, 333; 23 Atl. 372. See also *Austin v. Coal Co.*, 72 Mo. 535; *Kirk v. Mattler*, 140 Mo. 23.

<sup>2</sup> In *re Hancock's Estate* (Pa. C. P.), 7 Kulp, 36. For lease, which was held a sale of coal in place, see *Genet v. Delaware & H. Canal Co.*, 19 L. R. A. 127; 50 N. Y. S. R. 53; 32 N. E. 1078; 136 N. Y. 593. See also *Kirk v. Mattler*, *supra*.

<sup>3</sup> "A deed of a mining corporation to any part of its mine does not pass the title unless ratified by two-thirds of its stockholders, as provided in Cal. Act, April 23, 1880" (Cal. Stat. 1880, p. 131), § 1. *Pekin Min. & Mill. Co. v. Kennedy*, 81 Cal. 356; 22 Pac. 679.

<sup>4</sup> *Ante*, *idem*. *Williams v. Gaylord*, 185 U. S. 147.

<sup>5</sup> See *Lazarus's Estate* (Pa. Orph. Ct.), 6 Kulp, 53.

<sup>6</sup> *Taylor Land. & Ten.* (Vol. 2), p. 2, § 426. And the lessor may assign the royalty without assigning the reversion, or convey the reversion and

have the same effect as the assignment of an open account.<sup>1</sup> It is regarded as the assignment of a contract and like all other contracts and all rights of action arising from their breach, except those of a personal nature, the right to collect royalty may be transferred from one person to another. It is the mere assignment of a *chose in action*.<sup>2</sup> But the doctrine of privity, which obtained at common law, has a peculiar effect upon the liability of the parties to such a transaction.<sup>3</sup> The privity of contract is not transferred to the purchaser on the assignment, for this is a mere personal privity, and extends only to the persons of the original lessor and lessee.<sup>4</sup> The royalty, however, is considered a part of the *corpus* of the estate, and as the privity of estate remains annexed to the estate, the assignee, under the assignment, acquires a right of action against the lessee for the recovery of the royalty.<sup>5</sup> The law creates the covenant on the part of the lessee, to pay the royalty to the assignee, instead of the original lessor,<sup>6</sup> and after the assignment the

retain the royalty. *Willard v. Tillman*, 2 Hill, 274; *Dixon v. Niccolls*, 39 Ill. 372; *Watson v. Hunkins*, 18 Iowa, 547; *Hunt v. Thompson*, 2 Allen, 341.

<sup>1</sup> *Ante, idem*. For lease of a coal bank, held a sale of the coal, see *Tiley v. Mayges*, 4 M. M. R. 320.

<sup>2</sup> *Taylor's Land. & Ten.*, §§ 426-436 *et sub.* For liability of lessee for royalty upon unworkable mine, see *Phillips v. Jones*, 8 M. M. R. 344.

<sup>3</sup> *Taylor's Land. & Ten.*, § 439 and foot note on p. 16. A miners' strike, which prevents the excavation and transportation of coal, is a defense to suit on covenant for royalty, as these things are beyond lessee's control. *Glvens v. Providence Coal Co.* (Ky. 1901), 60 S. W. Rep. 304.

<sup>4</sup> *Taylor, supra*. But see *Stockb. I. Co. v. Cone Ir. Works*, 102 Mass. 80; *Fanning v. Tolker*, 40 Mo. 129; *Hatfield v. Lockwood*, 18 Iowa, 296.

<sup>5</sup> See *Taylor*, § 439 *et sub.*; 32 Hen. VIII., C. 34; *Leach v. Koenig*, 55 Mo. 451; *Fisher v. Deering*, 60 Ill. 124.

<sup>6</sup> *Funk v. Klucald*, 5 Md. 404; *English v. Key*, 39 Ala. 113; *Taylor's Land. & Ten.*, § 439 and cases cited.

assignor cannot be bound by equities which the lessee had acquired against him, after having notice of the assignment,<sup>1</sup> nor by equities arising before the institution of suit on the assignment.<sup>2</sup>

§ 267. *Time of the essence.* — Time is generally considered of the essence of a contract whenever it appears to have been part of the real intention of the parties that it should be so.<sup>3</sup> But when the character of the undertaking renders time material to the performance of the contract and the rights of the parties would be affected thereby, it may be implied as an essential to the contract, from the nature of the subject-matter with which the parties are dealing, even though there is no declaration of intention that it should be so in the contract.<sup>4</sup> The nature of all mining transactions, is such as to render time essential,<sup>5</sup> for, as observed in all of the older cases, “no science, foresight or observation can afford a sure guarantee against sudden losses, disappointment and reverses, and a person claiming an interest in such undertakings ought therefore to show himself in good time willing to partake in the possible loss as well as profit.”<sup>6</sup> And so time has been held to be a necessary element in contracts for the sale of mines, mineral and

<sup>1</sup> Taylor's Land. & Ten., § 450 *et sub.*

<sup>2</sup> Taylor's Land. & Ten., § 442 *et sub.*

<sup>3</sup> Fry Spec. Per. of Con., p. 414; Reed v. Chambers, 6 Gill. & J. 490; s. c. 7 Paige, 22; Smith v. Brown, 5 Gilm. 309.

<sup>4</sup> Hipwell v. Knight, 1 Y. & C. Ex. 416; Fry Spec. Per. Con., p. 416; Newman v. Rogers, 4 Bro. C. C. 391.

<sup>5</sup> Clegg v. Edmondson, 26 L. J. Ch. 681, *et idem* (L. J. J.) 673; Hull Coal Co. v. Emp. Coal Co., 113 Fed. Rep. 256. In a contract for oil, time is essential. Christies App., 9 M. M. R. 42. And as affecting the question of tender, see Fisher v. Worrell, 14 M. M. R. 624.

<sup>6</sup> Per K. Bruce, L. J., in Pendergast v. Turton, 1 Y. and C. C. C. 110.

mining plants<sup>1</sup> and works, and also in agreements to purchase mining stocks and calls.<sup>2</sup> But courts of equity were at one time inclined to neglect all considerations of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as effecting them by way of laches,<sup>3</sup> and although time has now come to be regarded as an essential element in mining contracts,<sup>4</sup> it is presumed that if the promisor had used reasonable diligence to discharge his obligation; if he had acted in good faith and his delay was not without just cause, a court of equity would exercise jurisdiction under these mitigating circumstances, and adjust the rights of the parties according to equitable principles,<sup>5</sup> and especially would this be true if the promisee had not suffered unreasonable damage on account of the promisor failing to perform on the day set.<sup>6</sup>

<sup>1</sup> *Parker v. Frith*, 1 S. & S. 199 and note; *City of London v. Mitford*, 14 Ves. 58; also, *Eads v. Williams*, 4 De G., M. & G. 674; *Neldon v. Smith*, 36 N. J. L. 148; *Beninger v. Hanks*, 61 Pa. St. Pa. 343. But see *Falls v. Carpenter*, 6 M. M. R. 397.

<sup>2</sup> *Sparks v. Liv. Water Works Co.*, 18 Ves. 428.

<sup>3</sup> *Fry Spec. Per. Con.*, pp. 415, 422; and *Lloyd v. Collett*, 4 Bro. C. C. 469 and note.

<sup>4</sup> "The working of a mine is a trade of a fluctuating character, and this incident brings it within that class of cases where time is the essence of the contract." *Macbryde v. Weekes*, 22 Beav. 533; M. M. D. 189. See also *Fooley v. Fletcher*, 3 H. & N. 769. As between vendor and purchaser, see *Lockhart v. Ogden*, 30 Cal. 547; also *Hancock v. Hodgson*, 4 Bing. 269.

<sup>5</sup> *Macbryde v. Weekes*, 22 Beav. 533; Blsp. Prin. Eq., § 391, pp. 451-452; *Tilley v. Thomas*, L. R. 3 Ch. 67; *Broshier v. Gratz*, 6 Wheat. 528; *Remington v. Irwine*, 2 Harris (Pa.), 143. In equity time is not of the essence unless the nature of the transaction demands it. *Ante, idem.* But see *Goldsmith v. Guild*, 10 Allen, 239; 1 Sug. V. & P. 411 (8 Am. Ed.).

<sup>6</sup> *Ante, idem.* *Tiernay v. Roland*, 3 Harris (Pa.), 429. "Time is not of the essence of an executory contract for the purchase of land where the delay in payment has been acquiesced in and the vendee has continued in possession, the vendor retaining his notes for purchase-money; although

§ 268. **Contracts of mining partnerships.** — The doctrine of agency applies to contracts of mining partnerships, the same as to those in other branches of trade,<sup>1</sup> and the different members of such a firm are bound by the contracts of their copartners, when the agreement is made in the usual course of the business and is beneficial or necessary to the purposes of the partnership.<sup>2</sup> In many particulars mining partnerships are governed by the same rules relating to ordinary commercial partnerships,<sup>3</sup> but they differ from a mercantile partnership in many important particulars.<sup>4</sup>

sudden and immense value has been given meanwhile to the premises by the discovery of gold." *Falls v. Carpenter*, 1 Dev. & Bat. Eq. 277 (N. C.); M. M. D. 241.

<sup>1</sup> *Bainb. on Mines*, 317 *et sub.* *Wait's Act. & Def.* Vol. 4), p. 435; *Hawkins v. Bourne*, 10 L. J. Ex. 361.

<sup>2</sup> *Nolan v. Lovelock*, 1 Mon. T. 224; *Taylor v. Castle*, 42 Cal. 367; B. & W. L. 521. But an incoming partner is not liable for contracts of the firm made before he became a member. *Babcock v. Stewart*, 58 Pa. St. 179. As to how far liability can be limited by contract between the members of the firm, see *Vice v. Fleming*, 1 Y. & J. 227; *Vice v. Lady Anson*, 1 M. & W. 96; 1 Man. & Ry. 113; 7 B. & C. 409. "Each member of a mining copartnership has power to bind the company by any contract within the scope of the partnership, and is a general agent of his copartners for such purpose. The fact that some of the partners were dormant, or the fact of their subsequent dissent does not affect the joint liability." *Burgan v. Lyell*, 2 Mich. 102; M. M. D. 265. The majority have the right to control the firm business. *Dougherty v. Creary*, 30 Cal. 290. And it is doubtful if one partner could limit his liability for necessities used by firm. *Nolan v. Lovelock*, *supra*.

<sup>3</sup> *Decker v. Howell*, 42 Cal. 86; B. & W. L. C. 508; *Wade's Am. Min. Laws*, § 151a, pp. 213-215; *Bainb. on Mines*, 343; *Arundell on Mines*, 30. "Mining has been called, in England, a species of trade. A colliery has been held not only the enjoyment of an estate, but in part carrying on a trade." *Tredwin v. Bourne*, 6 Mees. & W. 461; *Ambler*, 114. "Still, a purchaser of a coal mine, who worked it and sold the coals, was not considered a trader under the English bankrupt laws." *Port v. Turton*, 2 Wils. 169; *Blanchard & Weeks Ld. Cas.*, p. 548.

<sup>4</sup> The chief distinctions between mining and commercial partnerships, have been classed by the authors in *Blanchard & Weeks Ld. Cas.* (pp. 552

It may be stated as a general rule that the members of a mining partnership are liable for the debts contracted by an individual member of the firm, in the usual course of the business and within the scope of the partnership venture. The individual members, in the absence of anything to the contrary, have the implied power to bind the other members of the firm on such contracts.<sup>1</sup> But in the absence of stipulation or usage to the contrary, the individual members of a mining partnership cannot bind the firm, or authorize others to do so, by making or accepting bills of exchange, or any other species of commercial paper, for

and 558), as follows: "The leading distinctions between mining and ordinary commercial partnerships may be considered to be of three classes: 1st. The differences existing in the law in regard to the qualified or restricted liability of the partners to third persons, resulting from the acts of each other—in the doctrine of implied liability. 2d. The right of one partner to sell his interest or share without the consent of any of the other partners, and without the sale working a dissolution—in the absence of the *delectus personarum*. 3d. The death of one of the partners does not, according to the rule laid down in many cases, effect a dissolution. Aside from statutory regulations, however, this last point cannot be considered as fully settled." See *Jones v. Clark*, 42 Cal. 198; *Taylor v. Castle*, 42 Cal. 367; *Fereday v. Wightwick*, 1 Russ. & My. 45; *Bainb. on Mines*, 425; *Yale*, 221. "Upon other points, where there are no partnership articles to the contrary, mining associations are governed by the law of ordinary partnerships, unless general mining usages, or the established practice of a particular company, have changed or modified the rule." *Blanchard & Weeks Ltd. Cas.*, *supra*.

<sup>1</sup> *Decker v. Howell*, 42 Cal. 636; *B. & W. L. C.*, p. 508 *et sub.*; *Blanchard & Weeks Ltd. Cas.*, p. 543; *Peel v. Thomas*, 15 C. B. 714; 3 C. L. R. 397; 24 L. J. C. P. 86; *Greake v. Jackson*, 15 W. R. 388; 15 L. T. (N. S.) 509; 36 L. J. C. P. 108; *Johnson v. Gaslett*, 27 L. J. C. P. (N. S.) 123; *s. c.* 25 L. J. C. P. (N. S.) 274. "In an action against mining partners to recover for supplies furnished one of their number by the plaintiff, the latter could show that one of the defendants had so acted as to make plaintiff believe he was a partner with the party buying the supplies, and that as such he authorized the latter to buy the supplies, notwithstanding the general allegation of a partnership in the petition." *Hartney v. Gosling* (Wyo. 1902), 68 Pac. Rep. 1118.

this is not within the usual scope of the partnership business.<sup>1</sup> Nor can the individual members of a mining partnership bind the other members of the firm, by any contract, made by such individual member, when there is an express agreement to the contrary, of which the contracting party has notice, notwithstanding the contract is made in the usual scope of the business, and is germane and beneficial to the joint undertaking.<sup>2</sup>

<sup>1</sup> "The broad doctrine has been held that no liability can be created from the implied authority of one partner by the execution of a note, or bill of exchange, no matter how pressing the occasion or necessity for the use of the money in the working of the mine may be." *Ricketts v. Bennett*, 4 C. B. 686; 17 L. J. C. P. 17; *Dickenson v. Válpý*, 10 B. & C. 41; B. & W. L. C. 558; *Ex parte Baubauns*, 8 Ves. 540; *Ex parte Nolte*, 2 L. & J. 295; *Duncan v. Lowndes*, 3 Camp. 478. "But these extreme cases are, for the most part, under the cost-book system, and other authorities hold that the law implies an ability on the part of all the partners, in the absence of proof of a more limited liability, to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or useful in the management of them." *Tredwin v. Bourne*, 6 M. & W. 461; *Hawkins v. Bourne*, 8 M. & W. 703; *Peel v. Thomas*, 15 Com. Pleas, 714; *Vice v. Lady Anson*, 7 B. & C. 187; *Collyer on Partnership*, 661; B. & W. L. C. 558. And a partner can render himself liable on commercial paper by his own act. *Owen v. Van Ulster*, 10 C. B. 318; *Healey v. Story*, 3 Ex. Ch. 3; *Brown v. Byers*, 10 M. & W. 250; *More v. Charles*, 5 El. & B. 978. And see where firm was held liable: *Jones v. Clark*, 42 Cal. 180; *Babcock v. Stewart*, 51 Pa. St. 181; *Fox v. Frith*, 10 M. & W. 180; *Risto v. Harris*, 18 Wis. 400; *Decker v. Howell*, 42 Cal. 686.

<sup>2</sup> *Vice v. Lady Anson*, 1 M. & W. 96; 7 B. & C. 409; *Nolan v. Lovelock*, 1 Mont. T. 224. "All the partners of a firm (a mining partnership) are liable for the debts contracted by that firm; but this responsibility may be limited by express notice by one that he will not be liable for the acts of his copartners." *Vice v. Fleming*, 1 Y. & J. 227; M. M. D. 265. "But any restriction imposed by agreement among the partners on the authority possessed by them, though operative as between the partners themselves, does not limit their authority as to third persons who acquire rights under its exercise, unless such persons knew of the restriction imposed." *Oatey v. Bourne*; *Hawken v. Bourne*, 10 L. J. Ex. 361; 8 M. & W. 703; M. M. D. 406. Proof of acts which render one liable as a partner on a firm contract, will not apply to a tort of a



§ 269. **Contracts of mining corporations.** — It is one of the necessary incidents of a mining corporation that it should have the power to make contracts and to be able to bind itself to those dealing with it, as to matters which are within the general intent of the charter, or which are necessary for the carrying out of the purposes of the organization.<sup>1</sup> And in the absence of anything to the contrary in the charter, a mining corporation, through its proper officers, will have the implied power to make such contracts, and to incur debts which are in the usual scope of the corporate business, even though the charter is silent on the subject, and does not grant the express power to make contracts or incur debts.<sup>2</sup>

copartner. *McKnight v. Ratcliff*, 44 Pa. St. 156. See chapter, *Mining Partnerships*.

<sup>1</sup> *Wood Hydraulic Hose Min. Co. v. King*, 45 Ga. 84; *Moss v. Averill*, 10 N. Y. 449; *Bradley v. Ballard*, 55 Ill. 413. A contract made through the stockholders, if ratified by the corporation, is binding. *Gordon v. Swan*, 48 Cal. 564. As to contracts with members, see *Harts v. Brown*, 77 Ill. 226.

<sup>2</sup> *Wood Hy. H. M. Co. v. King*, *supra*; *Hillyer v. Overman Sil. Min. Co.*, 6 Nev. 51. But see as to contract where the contracting party has notice of the limitation upon agent's authority to bind the corporation, *B. & W. L. C.*, p. 574; *Lonkey v. Succor Mill and Mining Co.*, 10 Nevada, 17; *Yellow Jacket S. M. Co. v. Stevenson*, 5 *Ibid*, 224; *Hillyer v. Overman S. M. Co.*, 6 *Ibid*, 51. See also *Gilson Quartz Mining Co. v. Gilson*, *B. & W. L. C.* 574; *Schafer v. Bidwell*, 9 Nevada, 209; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Overman Silver Mining Co. v. American Silver Mining Co.*, 7 Nevada, 812; *Union Gold M. Co. v. R. M. N. Bank*, 1 Colorado, 531. See also *Blanchard & Weeks Ld. Cas.* (*supra*) as to power of president to bind corporation. "Under his general authority, a president of a mining company has no authority, merely as president, to make contracts of all kinds which will be binding on the corporation. His powers in that capacity only extend to matters arising in the ordinary course of the business of the corporation. Outside of these matters he has no power to bind the corporate body; and he is not authorized to make contracts for the purchase of property, unless required in the usual course of business. He has no power to make contracts with a view of extending the operations of the company." *Carpenter v. Biggs*, 46 Cal. 91; *Blen v. Bear River Co.*, 20 Cal. 602;

If the articles or by-laws of an incorporated company provide that the agents of the corporation shall not have authority to bind the corporation by certain kinds of contracts, although such a contract when made by an agent would be void in law, the contracting party could still recover from the corporation on a *quantum meruit*, if the corporation had itself received something of value and the contracting party had parted with something to his disadvantage.<sup>1</sup> But where there is nothing preventing it in the by-laws or articles of association the corporation will be bound by the contracts of its agents, made within the scope of their authority and for the purpose of carrying out the corporate business.<sup>2</sup> The agents of a mining corporation, however, in the absence of stipulation or usage, or an express authority to do so, will not have the power to bind the corporation on any species of commercial paper, even though the paper is given in payment for articles used in the ordinary business of the corporation.<sup>3</sup> And

Governor, etc. v. Fox, 16 Q. B. 229; 15 Jur. 703; 20 L. J. Q. B. 174. See Hillyer v. Overman Silver M. Co., 6 Nev. 51; B. & W. L. C. 574.

<sup>1</sup> Lindley on Part. (Vol. 2). Corporations are made liable on implied contracts, in most States, by statute. Statutes different States; Curtin v. Munford, 53 Ga. 168; Moss v. Averill, 10 N. Y. 449.

<sup>2</sup> Wood Hyd. H. M. Co. v. King, 45 Ga. 34. "The ownership of real estate is incident to the exercise of corporate mining franchises." Whitman M. Co. v. Baker, 3 Nev. 386; M. M. D. 109. "A corporation, unless prohibited, has authority to borrow money to accomplish the purpose for which it was organized." Union G. M. Co. v. Rocky Mt. Bank, 2 Colorado, 248; M. M. D. 102.

<sup>3</sup> Skellman v. Lackman, 23 Cal. 198; Gillig v. The Lake Bigler R. Co., 2 Nev. 214. The superintendent of a mining company has no authority to borrow money on the credit of the company, and the president cannot ratify such a loan. Union G. M. Co. v. Rocky Mt. Nat. Bank, 2 Col. 248. But see, *contra*, Magee v. Mokeinolua M. Co., 5 Cal. 258; McGorgle v. Hazeltine Coal Co., 4 W. & S. 424. "Corporations having power to purchase property can give promissory notes on such purchases, unless expressly prohibited by statute." Moss v. Averill, 10 N. Y. 449; M. M. D. 53. See also Moss v.

the agents of a mining corporation can neither make a valid sale or purchase of property for the corporation, unless they have authority to do so from the stockholders,<sup>1</sup> and the corporation will not be bound by any sale or purchase when made without authority by an agent of the corporation, even though the contract is ratified by the manager of the company, unless he had the authority from the stockholders to ratify the action of the agents.<sup>2</sup>

McCullah, 7 Barb. 279; *Coura v. Port Henry Iron Co.*, 12 Barb. 28. "A corporation whose agent has obtained money by overdraft at a bank, and applied it to the purposes of the company, is estopped to deny its power to borrow money in an action by the bank to recover the loan, *Union G. M. Co. v. Rocky Mt. Bank*, 3 Colorado, 248; *s. c. Id.* 565; 1 *K.* 581; *M. M. D.* 54. "The superintendent of a mining corporation cannot bind his company by a promissory note where he is not authorized by his company to make notes." *Carpenter v. Biggs*, 46 Cal. 91; *M. M. D.* 51.

<sup>1</sup> *Pekin M. & M. Co. v. Kennedy*, 81 Cal. 356; 22 Pac. Rep. 679. "The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders as such." *Wright v. Oroville M. Co.*, 49 Cal. 20; *M. M. D.* 53. "Conferring authority to sell and convey the property of a mining company is the exercise of corporate power." *Gashwiler v. Willis*, 33 Cal. 11; *M. M. D.* 55. "But a corporation organized for the purpose of owning ditches for the conveyance and sale of water, possesses the power of selling and conveying all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance, have a right to assume, as against the corporation, that the sale was for a lawful purpose." *Miners' D. Co. v. Zellerbach*, 37 Cal. 543; *M. M. D.* 55.

<sup>2</sup> "The subsequent ratification by corporation of acts of its agents not within the corporate powers will not render such void acts valid." *McCullough v. Moss*, 5 Denio, 566; *M. M. D.* 54. But see *Moss v. Rossie Lead M. Co.*, 5 Hill, 137; see *McCullough v. Moss*, 5 Den. 567. "When a mining corporation allowed two of its officers to purchase property, and afterwards received and operated the property: Held, a ratification of the purchase, even if originally made without authority, and that the corporation was liable on its note for the purchase money given by such officers." *Id.* *M. M. D.* 54. Corporation may assume debts of its promoters. *Paxon v. Bacon Min. Co.*, 3 *M. M. R.* 512. But it is not liable therefor, unless it does adopt such acts as its own. *Coyote Mining C. v. M. Co.*, 4 *M. M. R.* 88. See chapter *Mining Corporations*.

§ 270. **Contract to test for mineral.**—A contract to test for mineral, although it does not create an estate in the promisee, either in regard to the land,<sup>1</sup> or the minerals mined thereunder,<sup>2</sup> unless otherwise limited, transfers to the promisee the absolute right to mine the premises to which his operations are confined, and gives him a right of action against any third party who should enter under a subsequent contract with the mine owner and interfere with his operations.<sup>3</sup> If the contractor obliges himself to mine so much within a certain time,<sup>4</sup> or to prospect to a certain depth,<sup>5</sup> he will not be relieved from his covenant on account of the particular hardships that would result to him by a compliance therewith, but will be compelled to perform his contract, if in the realm of possibility,<sup>6</sup> although he would have the right to abandon the same after all indications of valuable ore had ceased,<sup>7</sup> provided he could show that a compliance with the contract would not lead to the discovery of such ore.<sup>8</sup> But where the contractor is to mine at his own expense, so long as he can profitably work the minerals, he is not compelled to mine when his operations cease to be of profit,<sup>9</sup> although he would forfeit his rights if he should cease work for an un-

<sup>1</sup> *Shaw v. Wallace*, 1 Dutch. (N. J.) 453.

<sup>2</sup> *Granby M. & S. Co. v. Turley*, 61 Mo. 375.

<sup>3</sup> *Shaw v. Wallace*, *supra*; *Austin v. Coal Co.*, 72 Mo. 535; *Kirk v. Mattier*, 140 Mo. 23.

<sup>4</sup> *Neldon v. Smith*, 36 N. J. L. 148; *Beninger v. Hankee*, 61 Pa. St. 343; *Cook v. Andrews*, 36 Ohio, 174.

<sup>5</sup> *Woodworth v. McLean*, 97 Mo. 325. In the absence of a custom or an express agreement the contractor is not bound to timber the mine. *No. 5 Min. Co. v. Bruce*, 4 Colo. 293.

<sup>6</sup> *Pollock on Con.* 349; *Chitty on Con.* 1070-1076; *Woodworth v. McLean*, *supra*.

<sup>7</sup> *Cook v. Andrews*, 36 Ohio St. 174; *Woodworth v. McLean*, 97 Mo. 325.

<sup>8</sup> *Ante, idem*, as to burden of proof.

<sup>9</sup> *Adams v. Orknob Copper Co.*, 7 Fed. Rep. 634.

reasonable time,<sup>1</sup> and where the mine owner himself furnishes the contractor the tools and means of prospecting, the latter is not responsible for any damage resulting to the mine owner, if he has himself used reasonable diligence in the prosecution of his operations and such as a reasonably prudent man would exercise in the use of the same tools and appliances.<sup>2</sup>

§ 271. **Contract to drain mines.**—The same rules of construction govern contracts to drain mining land that applies in the case of contracts to test for minerals, and where the contractor obligates himself unqualifiedly to drain certain mines, or a section of land, if the contract is indivisible he would not be permitted to recover on the same where he failed to drain the entire tract, even though his failure to drain the remainder of the tract was a physical impossibility.<sup>3</sup> He should have stipulated against the impossible in his contract and if he fails to do so, having, by his own act, assumed the undertaking, he is held to a full discharge of the duty created by the contract, notwithstanding his failure to comply with the covenant resulted from inevitable necessity.<sup>4</sup> But where by the contract the

<sup>1</sup> *Ante, idem.* "The 'test' required by a mining lease is such as will discover, not only the presence of minerals if they exist, but their commercial value, considering their abundance and accessibility." *Petroleum Co. v. Coal, C. & Mfg. Co.*, 89 Tenn. 381.

<sup>2</sup> *Campbell v. Gates*, 10 Pa. St. 483. "A company owning a quartz-ledge having contracted for the running of a tunnel to cut the same, promised the plaintiff to pay for provisions to be furnished the tunnel contractor, in case the contractor failed to reach the ledge, is bound upon such promise to pay, the tunnel being abandoned without reaching the lode." *Van Dusen v. Star Q. M. Co.*, 86 Cal. 571; *M. M. D.* 39. See for construction of prospecting contract, *North Geo. M. Co. v. Latimer*, 51 Ga. 67.

<sup>3</sup> *Brinkerhoff v. Elliott*, 43 M. A. 185; *Nichols v. Larkin*, 79 Mo. 264.

<sup>4</sup> *Brinkerhoff v. Elliott, supra*; 2 Pars. Con. (5 Ed.) 520; *McDermott v. Jones*, 2 Wall. 1-7; *Earp v. Taylor*, 73 Mo. 619; *Bishop on Con.*, §§ 577-

contractor has stipulated against the performance of the impossible, or does not agree, unqualifiedly, to drain all the tract, he would not be precluded from a recovery where he had failed to perform his entire contract, if the failure resulted either from unavoidable accident or the act of the mine owner, but would be allowed a reasonable compensation for the work done, according to the contract price,<sup>1</sup> and where the contract limits the contractor's duty to the drainage of the mine in its condition at the date of the contract, he could not be charged with any greater duty, but if the mine owner, in sinking, should develop a stronger vein of water, he would be relieved from a performance of the contract.<sup>2</sup>

§ 272. *Construction aided by custom.*—Where the rights of the parties to a mining contract are not clearly settled by the terms thereof, it is competent for the court in construing such contract, to determine the rights of the parties thereto, according to the construction that they have themselves placed upon the contract, and their own usage or acts under the contract is competent evidence to show the true intention had in view at the time of the making of the contract,<sup>3</sup> and it is competent to introduce the custom

609; *Davis v. Smith*, 15 Mo. 467; *Jemison v. McDaniel*, 25 Miss. 83. But for equitable doctrine, where contracting party is not in default, see *Bisp. Pr. Eq.*, § 188, p. 239; *Story Eq. Jur.*, § 90 *et sub.*

<sup>1</sup> Where failure to perform results from "act of God," see *Bishop on Con.*, §§ 577-609; *Lakeman v. Pollard*, 43 Me. 463. For the rule, laid down by the old cases, where party fails to stipulate against the impossible, see *Bishop on Con.*, § 590, p. 232. For equitable doctrine, see *Bisp. Pr. Eq.*, *supra*. See *Bishop on Con.*, § 143, for rule where breach results from obstruction of opposite party. See also *St. Louis v. McDonald*, 10 Mo. 609.

<sup>2</sup> *Pringle v. Taylor*, 2 Taunt. 150.

<sup>3</sup> *Leoners v. Cleary*, 75 Ill. 349; *Coleman v. Grubb*, 23 Pa. St. 393; *Cook v. Andrews*, 36 Ohio St. 174; *Randolph v. Horden*, 44 Iowa, 328.

in force where the contract was made to explain the force and effect to be given to ambiguous words used, as also to explain the intention of the parties from the language used.<sup>1</sup> It has been said that the parties are always presumed to contract with reference to the general custom or usage in force where the contract was entered into,<sup>2</sup> and it is well settled that a custom can be introduced to explain ambiguous words in the contract, as well as to control the rights of the parties on matters where the contract is silent.<sup>3</sup> But a custom is not permitted to govern the rights of the parties as against the expressed agreement of the parties,<sup>4</sup> nor could it be introduced to restrict the contract of the parties,<sup>5</sup> so where the custom is adverse to the rights created by the contract from the language used, or where it is in opposition to the established rules of law,<sup>6</sup> it could not be introduced by either party to govern in the construction of the contract.<sup>7</sup>

"Where the terms of an agreement respecting joint ownership of ore beds were doubtful, the usage of the parties in taking ore for their respective furnaces, would be an important element in their construction."

*Coleman v. Grubb*, 23 Pa. St. 398; *M. M. D.* 37.

<sup>1</sup> *Desloge et al v. Pearce*, 38 Mo. 588; *Rogers v. Brenton*, 10 Q. B. 26; *Collier on Mines*, pp. 22-41; *Balnb. Mines*, pp. 456-468; *McGarrity v. Byington*, 12 Cal. 427; *Willcox v. Wood*, 9 Wend. 849; *Stultz v. Dickey*, 5 Blinn. 285; *Gleason v. Walsh*, 48 Me. 397.

<sup>2</sup> *Bortin v. McKelway*, 2 Zab. 175; *Lantier v. Kellerman*, 18 Mo. 509; *Morin v. Hall*, 26 Mo. 386.

<sup>3</sup> *Desloge v. Pearce*, *supra*, and cases cited.

<sup>4</sup> *Shafto v. Johnson*, 8 B. & S. 252; *Randolph v. Hardin*, 44 Iowa, 328.

<sup>5</sup> *Randolph v. Hardin*, *supra*; *Desloge v. Pearce*.

<sup>6</sup> *Fritch v. Barker*, 2 Johns. 335; *Homer v. Dorr*, 10 Mass. 29.

<sup>7</sup> *Ante, idem.* *Woodworth v. McLean*, 97 Mo. 325; *Oreknob Copper Co. v. Adams*, 7 Fed. Rep. 634; *No. 5 Min. Co. v. Bruce*, 4 Colo. 293.

## CHAPTER XVIII.

### MORTGAGES OF MINES.

- SECTION 273.** Mortgagee may work mine.  
274. Cannot open new mines.  
275. Accounting by mortgagee.  
276. Mortgagor can continue to mine.  
277. Mortgage by mining corporation.  
278. Mortgage by partnership.  
279. Conflicts with other liens.  
280. Fixtures annexed to mortgaged premises.  
281. Effect of subsequent lease.  
282. Deed intended for mortgage.

§ 273. Mortgagee may work mine. — A mortgagee who has entered into possession of the mortgaged premises may lawfully work a mine located thereon, provided he applies the proceeds therefrom upon the mortgage debt.<sup>1</sup> Such use of the property, by the mortgagee, could not be treated as waste, by the mortgagor,<sup>2</sup> for although the mining would impair the value of the property, it is but putting it to the natural use to which it is adapted. A quarry can also be operated by a mortgagee, in possession, and the mortgagor could not enjoin such use of the premises.<sup>3</sup> A mortgagee would be held to a strict account of all proceeds of ore realized, however;<sup>4</sup> he could not

<sup>1</sup> *Irvin v. Davidson*, 3 Ired Eq. (N. Car.) 811.

<sup>2</sup> *Capnor v. Flemington Min. Co.*, 2 Gr. Ch. (N. J.) 467.

<sup>3</sup> *Vervalen v. Older*, 4 Halst. N. J. Ch. 98. "The proper use of a quarry cannot be considered waste, and will not be enjoined in favor of a mortgagee, and especially of a mortgagee who had himself sold the premises to the mortgagor as a quarry lot." *Vervalen v. Older*, 4 Halst. N. J. Ch. 98; *M. M. D.* 240. Mortgagee, however, could not work at all, if premises are of value sufficient to pay the mortgage debt. *Millett v. Davy*, 31 Beav. 470.

<sup>4</sup> A mortgage embracing all personal property of mortgagor, does not



charge the expense of opening the mine,<sup>1</sup> or any loss or damage to the mortgagor<sup>2</sup> and would be liable for any permanent injury to the premises, resulting from his negligent operations of the mine,<sup>3</sup> but would not be liable for such surface injury, as resulted, proximately and necessarily, from the mining operations, carefully conducted.<sup>4</sup>

§ 274. **Cannot open new mines.** — A mortgagee, in possession, while permitted to work mines already open, which is but putting the premises to their best use, is not permitted to open new mines or quarries on the premises, for in so doing he would be committing waste, and the right would not be one going with the estate created in the mortgagee.<sup>5</sup> But sinking a new shaft, or breaking the ground in a new place, to reach a vein of ore already opened and worked, would not be held to be the opening of a new mine and would not be restrained.<sup>6</sup>

§ 275. **Accounting by mortgagee.** — Where the mortgaged premises are perhaps not of value sufficient to pay

cover the business of mining or the proceeds. *Alabama National Bank v. Mary Lee Coal Co.*, 108 Ala. 288; 19 So. Rep. 404. But see, *contra*, *County of Gloucester Bank v. Rudry & Co.*, 64 L. J. Ch. (N. S.) 451; 1 Ch. 629; *Hood v. Easton*, 2 Giff. 692. "A mortgagee who holds property in pledge is responsible for it in its integrity; therefore a mortgagee of lands containing underneath unopened coal fields, who allowed the owners of adjacent coal mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal owners, was held responsible; and, besides the common decree, the court directed an account of all coal worked by the defendants, or either of them, or of the proceeds thereof." *Hood v. Easton*, 2 Giff. 692; M. M. D. 289.

<sup>1</sup> *Hughes v. Williams*, 12 Ves. Jr. 493.

<sup>2</sup> *Millett v. Davey*, 31 Beav. 470.

<sup>3</sup> *Millett v. Davey*, 31 Beav. 470.

<sup>4</sup> *Ante*, *idem*.

<sup>5</sup> *Thorncraft v. Crockett*, 16 Sims. Ch. 445; s. c. 10 M. M. R. 529.

<sup>6</sup> *Elias v. Snowden Quarries Co.*, L. R. 4 App. Cas. 454; s. c. 15 M. M. R. 143.

the debt, a mortgagee working the mines, at common law, would only be chargeable with the net profits realized from the mine.<sup>1</sup> If the premises were more than sufficient to pay the debt, since the mortgagee, in such case, would have no right to dispose of any part of the premises, he would be held to account for the net proceeds of the mineral sold.<sup>2</sup> As a sale of the ore would put it out of the power of the mortgagee to restore the same, if he should sell, without keeping an account of the ore disposed of, or otherwise exceed his powers, he would be made to bear his losses himself and also account for the profits realized;<sup>3</sup> and where the quantity of mineral removed is in issue, it is incumbent upon the mortgagee in possession to show the amount taken.<sup>4</sup>

§ 276. *Mortgagor can continue to mine.*—A charge of waste, whereby the mortgage security is diminished, as by mining, is a sufficient ground for an injunction to restrain a sale of the ore.<sup>5</sup> But where the premises were used as mining land, prior to the mortgage, a continuance to so use them, by the mortgagor, would not be considered waste and would not be restrained,<sup>6</sup> although an application

<sup>1</sup> *Millett v. Davy*, 31 Beav. 470; *Rowe v. Mead*, 2 Jac. & Walk. 553.

<sup>2</sup> *Millett v. Davy*, *supra*. "Until a mortgagee of a mine takes possession, either in person, or by receiver, the mortgagor is entitled to the income from operating the same." *Young v. Northern Ill. Co.*, 9 Biss. (U. S.) 300; *s. c.* 10 M. M. R. 596.

<sup>3</sup> *Thorncraft v. Crockett*, 16 Sim. 445; *Hood v. Easton*, 2 Gif. 692; 2 Jur. (N. s.) 729.

<sup>4</sup> *Powell v. Aiken*, 4 Kay & J. 343. But the mortgagor must produce the balance due, on an action to oust the mortgagee. *Irwin v. Davidson*, 7 M. M. R. 237.

<sup>5</sup> *Capner v. Flemington Co.*, 2 Gr. Ch. (N. J.) 467; *s. c.* 3 N. J. Eq. 467; 7 M. M. R. 263.

<sup>6</sup> *Ante, idem.* But see *Elias v. Snowden Quarries Co.*, L. R. 4 App. Cas. 454; *s. c.* 15 M. M. R. 143. For accounting against mortgagor and his tenants, see *Bentley v. Bates*, 10 M. M. R. 525.

of the profits to the mortgage debt would be required, if the security was not ample.<sup>1</sup>

§ 277. **Mortgage by mining corporation.** — The power to mortgage its property is incidental to the right of every mining corporation to borrow money to carry on its business.<sup>2</sup> And, generally, a mortgage executed for lawful objects would be valid, although used, in part, for purposes not authorized; <sup>3</sup> and if the property were situated in a State other than that where the mortgage was made, it would nevertheless be a valid mortgage, if not opposed to the law of the State where the real estate was situated.<sup>4</sup> A mortgage not authorized and executed by the proper authorities, however, would be void; <sup>5</sup> a mortgage to the company's directors and not recorded, would be illegal, as against its creditors; <sup>6</sup> although a mortgage to its directors for a *bona fide* debt and recorded, would be upheld.<sup>7</sup> A mortgage would generally be upheld, although made for an unauthorized purpose, where the company had used the money,<sup>8</sup> and the rights of the mortgagee in such case

<sup>1</sup> *Bentley v. Bates*, 4 Y. & C. 182. "Mortgagee of the share of one tenant in common of a mine, may maintain a bill for an account against the mortgagor and the cotenants in common." *Bentley v. Bates*, 4 Y. & C. 182; M. M. D. 240. *Amer. Tr. Co. v. Belleville Quarry Co.*, 31 N. J. Eq. 89; s. c. 10 Mor. Min. R. 59. The mortgagor of a claim upon public land cannot abandon it and then relocate to defeat the rights of the mortgagee. *Alexander v. Sherman* (Ariz.), 16 Pac. Rep. 45.

<sup>2</sup> *Lehigh Valley Coal Co. v. West Depere & Co. Works*, 63 Wis. 45.

<sup>3</sup> *Carpenter v. Black Hawk I. M. Co.*, 65 N. Y. 43.

<sup>4</sup> *Carpenter v. Black Hawk Co.*, *supra*.

<sup>5</sup> *Alta Silver Mining Co. v. Alta Placer Min. Co.*, 78 Cal. 639, where a mortgage, executed by the president and secretary, without a resolution of the board of directors, was held void. See also *Williams v. Gaylord*, 185 U. S. 147.

<sup>6</sup> *In re Winn Hall C. Co.*, L. R. 10 Eq. 515.

<sup>7</sup> *Hall v. Redding*, 13 Cal. 214.

<sup>8</sup> *Wright v. Hughes*, 119 Ind. 324; *Browning v. Mullins* (Ky.), 13 S. W. Rep. 427.

would be protected, notwithstanding a defective execution,<sup>1</sup> or acknowledgment,<sup>2</sup> of the mortgage.

§ 278. **Mortgage by partnership.** — Any one or more of the members of a mining partnership has the power to execute a mortgage upon the personal property of the firm for business purposes of the firm and within the scope of the firm business,<sup>3</sup> but as to the real estate of the firm, since the different members usually own their several interests individually, a different rule would obtain.<sup>4</sup> But as no one of the partners has any distinct interest in any part of the firm property, a mortgagee of a copartner's individual interest would be entitled to an accounting, after payment of the firm debts,<sup>5</sup> but would take no interest in the firm property, as such.

§ 279. **Conflicts with other liens.** — In a controversy between a mortgagee and other lien claimants, it is the duty of the court to determine the relative rights of all the

<sup>1</sup> *First Nat. Bank v. Salem & Co.*, 39 Fed. Rep. 89.

<sup>2</sup> *Fitch v. Lewiston & Co.*, 80 Me. 34. But see *Williams v. Gaylord*, *supra*.

<sup>3</sup> *Keck v. Fisher*, 58 Mo. 532; *Holt v. Simmons*, 16 Mo. App. 97.

<sup>4</sup> *Grubb's App.*, 66 Pa. St. 117.

<sup>5</sup> *Tennent v. Gunther*, 31 Mo. App. 429. "The mortgagee of shares in a mining partnership is not at liberty to contest, or share in settlements made prior to the filing of the bill." *Redmayne v. Forster*, Law R. 2 Eq. 467; *s. c.* 35 L. J. Ch. 847; M. M. D. 241. "A mortgagee of shares in a mining partnership is entitled to an account of the profits of the partnership made after the filing of the bill, and of the existing debts and liabilities, and to have the share of such debts and liabilities attributable to the mortgaged shares ascertained. The mode of operating a colliery considered." *Redmayne v. Forster*, Law R. 2 Eq. 467; *s. c.* 35 L. J. Ch. 847; M. M. D. 241. Foreclosure, not sale, is the remedy of the mortgagee of a partner's share. *Redmayne v. Forster*, 10 M. M. R. 541.

parties.<sup>1</sup> If the mortgage was given prior to the commencement of any work, or the delivery of any material, it will have priority over a lien for labor or material furnished;<sup>2</sup> but a mechanic's lien is usually superior to all liens acquired after the work commenced, or materials were furnished,<sup>3</sup> and such liens are usually held to have precedence over other liens, though prior in time, if the mechanic had no actual or constructive notice of the prior lien.<sup>4</sup> Much depends, however, on the language of the statute under which the lien is given, as different statutes date the mechanic's lien from different periods, some from the date of the contract,<sup>5</sup> and others from the commencement of work, or the furnishing of materials.<sup>6</sup> Under the registry laws of most of the States, a mechanic, or laborer, is held to have notice of a recorded mortgage,<sup>7</sup> and to give a prior mortgage effect, as against a subsequent lien, it must be recorded.<sup>8</sup>

§ 280. **Fixtures annexed to mortgaged premises.**—  
The mortgagee is entitled to the benefit of any appreciation

<sup>1</sup> *Johnson v. Badger Mill and Min. Co.*, 13 Nev. 357, *s. c.* 3 M. M. R. 386.

<sup>2</sup> *Jessup v. Stone*, 13 Wis. 466; *Green v. Sprague*, 120 Ill. 416; *Phillipps Mech. Liens*, Sec. 232; *Capron v. Sprout*, 11 Nev. 304; 9 M. M. R. 391, where a mortgage was held superior to a miner's lien for wages. But see *Amer. Tr. Co. v. Bellvill Co.* (10 M. M. R. 594), where a mortgagee, allowing the mortgagor to work a quarry, was held to let in an intervening lien for labor.

<sup>3</sup> *Phillipps Mech. Liens*, Sec. 226.

<sup>4</sup> *Ante, idem.* *Fritch v. Morton*, 10 Colo. 337.

<sup>5</sup> *Batchelder v. Rand*, 117 Mass. 176; *Phillipps on Mech. Liens*, Sec. 226. A prior mortgage is superior to later laborer's liens, although mining corporation is in hands of receiver. *Merriam v. Min. Co. (Oreg)*, 60 Pac. Rep. 997 (1902).

<sup>6</sup> *Ante, idem.* *Soule v. Hurlbut*, 58 Conn. 511.

<sup>7</sup> *Folsom v. Cragen*, 11 Colo. 205.

<sup>8</sup> *Phillipps Mech. Liens, supra.* As to lien of mine foreman, see *Capron v. Sprout*, 11 Nev. 304.

of the mortgaged premises arising from any cause, and it is accordingly held that "fixtures feed the mortgage," by which is meant that engines, boilers, and other fixtures annexed to the premises, by the mortgagor, constitute a parcel of the mortgage security, and if their removal would be injurious to the mortgagee the mortgagor cannot remove the same.<sup>1</sup> The mortgage has been held to cover not only annexations made by the mortgagor himself, subsequent to the mortgage,<sup>2</sup> but also those by a tenant of the mortgagor;<sup>3</sup> but the strictness of this harsh doctrine, of late years, has been relaxed; the intention of the party making the annexation is regarded as the safest criterion, and if it was not the intention that the fixtures should be considered a part of the real estate, they will retain the character of personality.<sup>4</sup>

<sup>1</sup> *Roberts v. The Dauphin Deposit Bank*, 19 Pa. St. 71; *s. c.* 6 M. M. R. 54; *Ewell Fixtures*, pp. 280-281; *Union Water Co. v. Murphy's Flat Flaming Co.*, 22 Cal. 681. But as to fixtures subsequently annexed, see *Davenport v. Shants*, 43 Vt. 546. Machinery erected by a licensee and incorporated in a mining plant does not become a part of the land and a mortgagee of same can hold such machinery as against a lien claimant. *Springfield F. & M. Co. v. Cole*, 130 Mo. 1.

<sup>2</sup> *Ewell Fixtures*, p. 282; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116. "Machinery, which is a constituent part of the manufactory to the purpose of which the building has been adapted, without which it would cease to be such manufactory, is part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution-creditor, but not between tenant and landlord and remainder-man; ruled, therefore, that a mortgage and sale of a lot and iron rolling mill, with the buildings, apparatus, steam-engine, boilers and bellows attached to the same, passed the entire set of rolls used in the mills, whether actually in place or temporarily detached to make room for such as were; and that such rolls could not be seized and sold as chattels on *ieri facias* against the mortgagor." *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116; M. M. D. 106.

<sup>3</sup> *Gardner v. Finley*, 19 Barb. 317; *Frankland v. Moulton*, 5 Wis. 1; *Culwick v. Swindle*, L. R. 3 Eq. 249; *Preston v. Briggs*, 16 Vt. 124; *Trapper v. Harder*, 3 Tynwh. 603. See *Koch v. Richardson*, 81 Mo. 221.

<sup>4</sup> *Ewell Fxt.*, p. 283; *Eaves v. Estis*, 10 Kan. 814; *Yates v. Muller*

§ 281. **Effect of subsequent lease.** — While a mortgagee would hold his security subject to a pre-existing lease of the premises,<sup>1</sup> a subsequent lease would not bind the mortgagee,<sup>2</sup> but upon an entry for breach of the condition of the mortgage, the mortgagee, at his election, could eject the tenant, as a trespasser, or recognize him as his tenant.<sup>3</sup>

§ 282. **Deed intended for mortgage.** — A deed, absolute on its face, if intended only as the security for a debt, may be shown to be a mortgage.<sup>4</sup> A mortgage will result where there is an agreement to reconvey the title to the

23 Ind. 562; *Cripper v. Morrison*, 13 Mich. 85. "A steam engine set up for the benefit of a colliery by a tenant for life shall be considered as part of his personal estate, and go to the executor, for the increase of assets in favor of creditors." *Lawton v. Lawton*, 3 Atk. 18; M. M. D. 106. "Salt kettles were bought and mortgaged to the seller as personalty. They were imbedded in brick arches, but could be removed without injury to them, by displacing a considerable portion of the brick at inconsiderable expense, and the course of the manufacture required them to be thus removed, and be reset annually: Held, that they continued personalty as against a subsequent purchaser of the salt works, who had no notice of the facts, other than constructively from the filing of the chattel mortgage." *Ford v. Cobb*, 20 N. Y. 844; M. M. D. 106. "A., the owner of a quartz mill in Amador County, executed a mortgage on the same to B. Afterwards, A. purchased at Sacramento a steam engine and boiler, and to secure the purchase-money, executed to C. a chattel mortgage of the same, and then transported them to Amador, and placed them in the quartz mill, so that they became a part of the realty: Held, that C.'s mortgage on the steam engine and boiler had priority over the mortgage of B." *Tibbetts v. Moore*, 23 Cal. 208; M. M. D. 107. A stationary engine fastened with bolts to a pump house, passes under a mortgage of the mine as a fixture. *Don v. Warner*, 28 U. S. 202. But see, *contra*, *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153.

<sup>1</sup> *Logan v. Green*, 4 Ired. Eq. 370.

<sup>2</sup> *Gartside v. Outley*, 58 Ill. 210; 11 Amer. Rep. 59; 10 M. M. R. 566.

<sup>3</sup> *Gartside v. Outley*, *supra*. A mortgagee is entitled to accounting from a lessee who holds under a subsequent lease. *First Nat. Bank v. Min. Co.*, 89 Fed. Rep. 449.

<sup>4</sup> *Blackwell v. Overby*, 6 Iredell's Eq. (N. C.), 38; s. c. 10 M. M. R. 531.

grantor, on payment of the debt;<sup>1</sup> where there is a deed and bond to reconvey;<sup>2</sup> where there is a deed with a defeasance clause,<sup>3</sup> or where, by parol evidence, it can be shown that such a defeasance was to be annexed and the conveyance was to be a mere security for money borrowed.<sup>4</sup> And while the rule obtains that parol evidence would not be admissible to prove a conflicting contemporaneous agreement that the deed was to be a mortgage,<sup>5</sup> the court would permit proof of all the collateral facts and circumstances that would be incompatible with the idea of a purchase,<sup>6</sup> and construe the instrument, according to the facts and circumstances, and the actual, instead of the expressed, intention of the parties.<sup>7</sup>

<sup>1</sup> Brophy Co. v. Brophy Co., 15 Nev. 101; 10 M. M. R. 601; Sharp v. Arnott, 10 M. M. R. 580.

<sup>2</sup> Walker v. Tiffin Co., 10 M. M. R. 572; 2 Colo. 89.

<sup>3</sup> Halsley v. Martin, 22 Cal. 645; s. c. 10 M. M. R. 549.

<sup>4</sup> Blackwell v. Overby, *supra*. Any fact that will throw light upon the matters in issue is admissible in evidence, in such a controversy. Hancock v. Watson, 10 M. M. R. 540.

<sup>5</sup> Blackwell v. Overby, 10 M. M. R. 531.

<sup>6</sup> Blackwell v. Overby, *supra*; Hancock v. Watson, 18 Cal. 128; 10 M. M. R. 546.

<sup>7</sup> Hancock v. Watson, *supra*. "Tubbs conveyed to Walker his interest in certain mining property, and the next day Walker executed a title bond to Tubbs binding himself to reconvey after he took from the mine the amount of a certain note: Held, that the deed and bond together amounted to a mortgage, and that Walker as mortgagee in possession was bound to reconvey as soon as his debt was satisfied." Walker v. Tiffin M. Co., 2 Colorado, 89; M. M. D. 241. "Where a mining claim was sold by deed absolute, the purchaser at the same time making his agreement in writing to reconvey upon certain payments, and that the proceeds of the claim should be applied as payments under such agreement, after deducting interest and expenses: Held, that the original debt for which the deed was given was not extinguished, and that the contemporaneous instruments should be construed as a mortgage." Hickox v. Lowe, 10 Cal. 197; M. M. D. 241.



## CHAPTER XIX.

### AGENCY AS APPLIED TO MINING TRANSACTIONS.

- SECTION 283.** General principles of the doctrine.  
284. Capacity of persons to become agents.  
285. How agencies are created.  
286. Declarations of agent — Competent, when.  
287. Liability of principal for acts of agent.  
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296. Powers of superintendent — Supplies.  
297. Directors the agents of company.  
298. Agents appointed by directors.  
299. Same — Limitation upon authority.  
300. Agents who exceed authority.  
301. Agents in judicial proceedings.

§ 283. General principles of the doctrine. — The law of agency permeates nearly all the different avenues of business life and is recognized as a very potent factor in the commercial world. It applies to all transactions where one acts through the person of another, and although the law concedes to every man the power to act through his agents to the same extent as he can act himself, it lays down the broad rule of liability, holding him responsible for the acts of his agents to the same extent as though he had acted for himself.<sup>1</sup> But in order to hold the principal

<sup>1</sup> Smith's Ld. Cas. 1659 *et seq.*; *Eckert v. St. L. Transfer Co.*, 2 Mo. App. 86. And when the principal is disclosed, agent is not liable unless he specially agreed to be. *Whitney v. Wyman*, 101 U. S. 392.

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for the acts of his agents it must appear: (1) That the principal was himself competent to make contracts and hence to employ an agent; (2) that the agent was competent to act as such; and, (3) that he was authorized to do the act for which the principal is to be held responsible.<sup>1</sup>

**§ 284. Capacity of persons to become agents.**—The same degree of mental capacity is not required for one to become an agent that is necessary to be a principal.<sup>2</sup> There is hardly any legal restrictions upon the power to become an agent, and while in most States infants and aliens are incapacitated from making contracts for themselves,<sup>3</sup> they can nevertheless act to the fullest extent as the agents of another.<sup>4</sup> But if the disability were so great that the party could not understand the nature of the business he was to transact, he could not be a lawful agent; if this were the case, however, it would render the person wholly incompetent to attend to the business, and this is about the only limitation upon the capacity of persons to become agents.<sup>5</sup>

**§ 285. How agencies are created.**—An agency may be created either by express or implied authority or a

<sup>1</sup> Smith Ld. Cas. 1753; Jolly v. Rees, 15 C. B. (N. S.) 628. And if the agent acts without authority he thereby renders himself liable. Sm. Ld. Cas. 1659; Longbottom v. Rogers, 2 M. & Gr. 427.

<sup>2</sup> Governor v. Dally, 14 Ala. 469; Daniel Neg. Inst., § 272; Tiedeman Com. Pap., § 73.

<sup>3</sup> Engman v. Immel, 59 Wis. 249. And see as to common law rule, Singleton v. Mann, 8 Mo. 464.

<sup>4</sup> Smith Ld. Cas., p. 1756 *et seq.* But if the wife lives apart from husband she would have no implied power to bind him by her acts. Johnson v. Sumner, 3 H. & N. 261; 3 Sm. Ld. Cas. 1757.

<sup>5</sup> Tiedeman Com. Pap., § 73; Daniel Neg. Inst., § 272. A lessee is not the agent of lessor, but has but a qualified property of his own. Wilkins v. Abell, 26 Colo. 462; 58 Pac. Rep. 612.

subsequent ratification. No particular form of words is necessary to create an express agency and the character of the business to be transacted alone determines whether it is necessary for the authority to be in writing.<sup>1</sup> An agent acting by an express authority has, by necessary implication, all the powers that are needed to perform the duties contemplated by the express authority,<sup>2</sup> and although the act of an agent was not authorized on this ground, the principal will still be held responsible and bound by any subsequent exercise of authority of a like character, if he has in any way recognized the act of the agent as his own, or ratified it as the act of his agent;<sup>3</sup> and although the principal may have revoked the agent's authority, he is still liable and would be bound by his acts, until he has given the world notice of the revocation, or at least the parties dealing with the agent.<sup>4</sup> But if the agent guarantees

<sup>1</sup> *Shaw v. Mudd*, 8 Pick. 9; *Miles v. Cook*, 1 Grant (Pa), 58; *Barker v. Garvey*, 88 Ill. 184; *Challener v. Bauck*, 56 Wis. 652; *Deverell v. Bolton*, 18 Ves. 505.

<sup>2</sup> *Gerish v. Mayer*, 70 Ill. 470; *Rhine v. Blake*, 59 Texas, 240; *Smith v. Johnson*, 71 Mo. 382.

<sup>3</sup> *Prescott v. Flynn*, 2 More & S. 18 (9 Bing 19); *Stroh v. Hinchman*, 37 Mich. 490; *Abel v. Seymour*, 13 N. Y. L. C. (6 Hun) 656. "The question whether a mining company shall be inferred to have ratified an unauthorized act of its agent by delay in disavowing such act is a question for the jury. And where money had been borrowed by an agent without authority, the company notified on December 16, and fifteen days later the president undertook to present the claim to the board at a meeting to be held in February, but the corporation did not disavow the act until the following spring: Held, that a finding of ratification might be warranted." *Union G. M. Co. v. Rocky M. Nat. Bank*, 1 Colorado, 532; 2 *Id.* 248, 565; M. M. D. 10. "In an action against a mining company to recover money borrowed by its agent without authority, the circumstance that the company retained the ore taken from the mine by the use of the money is not material to the question of ratification." *Union G. M. Co. v. Rocky M. Nat. Bank*, 1 Colorado, 532; 2 *Id.* 248, 565; M. M. D. 12.

<sup>4</sup> *Heath v. Sanson*, 1 Nev. & Man. 104; *Mor. Min. Dig.*, p. 271. And

his authority and the facts of his agency are not equally within the knowledge of the opposite party the agent alone can be held for his unauthorized acts.<sup>1</sup>

§ 286. **Declarations of agent—Competent, when.**—Both as regards the previous authority of an agent's acts, as well as a subsequent ratification thereof, the question of how far the acts and declarations of the agent himself are competent, frequently becomes important.<sup>2</sup> The statements of an assumed agent are not evidence of the fact of his agency,<sup>3</sup> unless made in the presence or hearing of the principal; but after an agency is established, then the acts and declarations of the agent, made in regard to the acts he is performing, as agent, are competent to bind his principal.<sup>4</sup> But even after the agency is established, the

the effect and operation of a notice of revocation is always a question of fact for the jury. *Vice v. Fleming*, 1 Y. & J. 227.

<sup>1</sup> Sm. Ld. Cas. (Vol. 3), p. 1659; *Bartlett v. Tucker*, 104 Mass. 334; *Draper v. Mass. &c. Co.*, 5 Allen, 338; *Duncan v. Nells*, 32 Ill. 542; *Randall v. Trimen*, 18 C. B. 786; *Fell v. Otis*, 63 Me. 329; *Hall v. Crandall*, 29 Cal. 572; *Bryson v. Lucas*, 84 N. C. 680; *Kreager v. Pitcalrne*, 5 Ont. (Pa.) 311.

<sup>2</sup> "Ratification of the acts of S.: Held, that upon the question of ratification the fact that S. was the agent of the company for some purpose, and the nature and extent of his agency (even though not extending to the act in question) was material and competent." *Union M. Co. v. Rocky Mt. Bank*, 2 Colorado, 248 and 565; 1 *Id.* 531; M. M. D. 12.

<sup>3</sup> *Van Dusen v. Star Queen Min. Co.*, 36 Cal. 571. "Agency cannot be proved by evidence of the declaration or conduct of the alleged agent." *Americus Oil Co. v. Gurr*, 40 S. E. Rep. 780 (Ga. 1902).

<sup>4</sup> "Declarations of agent are not admissible to establish the agency, but the agency being otherwise shown, or testimony sufficient to warrant the jury in finding either an original agency, or subsequent ratification being produced, the declarations of the alleged agent made during and within the scope of his authority then become admissible to establish other facts in issue in the same case." *Union M. Co. v. Rocky Mt. Bank*, 2 Colorado, 248, 565; 1 *Id.* 531; M. M. D. 12. "Neither the declarations

declarations of the agent, to be binding on the principal, must have reference to, or be within the scope of the duties of the agent, and the principal will not be bound by acts or declarations of the agent, made in regard to matters beyond the scope of his authority.<sup>1</sup>

§ 287. **Liability of principal for acts of agent.** — The general rule of liability holds the principal responsible for all acts of the agent, done within the general scope of his authority.<sup>2</sup> Under this rule of liability one member of a mining copartnership is responsible for the acts of his copartner, done within the general scope of the partnership business;<sup>3</sup> and in mercantile copartnerships the firm is liable on commercial paper executed in the firm name, and for firm purposes, by a member.<sup>4</sup> In mining partnerships, however, one partner is not responsible on commercial paper executed by his copartner, for this does not come within the general scope of a mining partnership, and one partner has no implied authority to bind the firm on commercial paper.<sup>5</sup> But the officers of a mining corporation can issue notes without express or formal resolution

nor the acts of a man can be given in evidence to prove that he was the agent of another, though he may testify on the question of his agency." *Garber v. Blatchley*, 41 S. E. Rep. 222.

<sup>1</sup> "The acts of a mining superintendent of a flume, in constructing, repairing and superintending the same, are binding upon the principal, but such authority does not make his acts and declarations in respect to title admissible to affect his principal." *Herbert v. King*, 1 Mont. 475; M. M. D. 9.

<sup>2</sup> See *Smith's Ld. Cas.*, *supra*, and authorities cited.

<sup>3</sup> *Nolan v. Lovelock*, 1 Mont. 224; *Daugherty v. Creary*, 30 Cal. 290.

<sup>4</sup> *Tiedeman on Com. Paper*, Ch. VI., § 94 *et seq.*

<sup>5</sup> *Dickinson v. Palpy*, 10 B. & C. 128; *Brumah v. Roberts*, 3 Bing. N. C. 96; *Tiede, Com. Paper*, § 96, p. 164. But the partner in issuing such paper will render himself individually liable. *Owen v. Van Ulster*, L. J. (N. S.) C. P. 61; 10 C. B. 318; B. & W. L. C. 559; *More v. Charles*, 5 El. & B. 978; 25 L. J. Q. B. 119.

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of its board of directors, and the authority to issue commercial paper may be inferred from the acquiescence of the corporation in the acts of accredited officers in the regular course of its authorized business.<sup>1</sup> And although the issuance of commercial paper is not within the general scope of the business of a mining partnership, it is probable that the firm would be held liable on paper issued by one of its members, if it could be shown that such dealing was established and customary with the firm, or that similar acts of the members had been ratified and adopted by the firm.<sup>2</sup>

§ 288. Same — For torts of agents.— The principal is also liable for the wrongs or torts of his agent, committed with his knowledge or consent, or within the general scope of the agent's employment.<sup>3</sup> There are many cases where the principal and agent could both be held responsible for a tort committed by the agent,<sup>4</sup> and cases where only the principal or agent would be severally responsible for the acts of the agent;<sup>5</sup> but the fact that one chargeable with

<sup>1</sup> *First Nat. Bank of Hannibal v. North Missouri Coal & Min. Co.*, 86 Mo. 125; *Preston v. Mo. & P. L. Co.*, 51 Mo. 501.

<sup>2</sup> And see *Blanchard & Weeks Ltd. Cas.*, p. 559, where it is said: "Where there was nothing in the constitution or charter of a colliery company to exclude the ordinary authority of a partner to borrow money on the credit of the company, for the purposes of the partnership, the authority of some to bind the others was recognized. The association was placed on the same footing as an ordinary trading partnership." (*Brown v. Kidger*, 28 L. J. (N. S.) Exch. 66; 3 Hurl. & N. 853. See, generally, *Fair v. Richmond*, 11 Ad. & El. 339; *In re German Mining Co.*, 24 L. J. (N. S.) Ch. 41; 22 L. J. (N. S.) Ch. 926; *Ducarry v. Gill*, 4 Carr & P. 121; 1 M. & M. 450.) B. & W. L. C. 559.

<sup>3</sup> *Cooley on Torts*, §§ 227-228.

<sup>4</sup> *Nichols v. Nowling*, 82 Ind. 488; *Atkins v. Johnson*, 43 Vt. 78; *Crossman v. Owen*, 62 Me. 528.

<sup>5</sup> *Howard v. Clark*, 43 Mo. 344; *Bond v. Ward*, 7 Mass. 125; *Nelson v. Cook*, 17 Ill. 446; 31 Wis. 533.

the wrongs of another is only liable by reason of some relation existing between the parties and that an action for indemnity would lie as between such wrong-doers would not affect the rights of the injured party to recover;<sup>1</sup> and where the wrong is joint, or more than one is liable for the acts committed, it is no defense to an action against either of the wrong-doers, that the other has not been made a party to the suit.<sup>2</sup> And corporations are responsible for the wrongs committed or authorized by them, under substantially the same rules which govern the responsibility of natural persons,<sup>3</sup> and although it was formerly supposed that torts involving the element of evil intent could not be committed by corporations, this idea now no longer obtains,<sup>4</sup> but it is well settled that while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by the corporation.<sup>5</sup>

<sup>1</sup> *Coventry v. Barton*, 17 Johns. 142; *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218; *Smith v. Foray*, 43 Conn. 244.

<sup>2</sup> *Babcock v. Gifford*, 29 Hun, 186. But for individual liability of corporations, see *Bassett v. Fish*, 75 N. Y. 303.

<sup>3</sup> *Cooley on Torts*, § 119, p. 186 and cases cited.

<sup>4</sup> *Ante, idem.* "Corporations are equally responsible for injuries done in the course of their business of their servants as natural persons." *Field, J.*, in *Baltimore & c. Ry. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 330. But corporations are not liable for such wrongs of its servants as are beyond the scope of corporate authority. *Isaacs v. Third Av. R. R. Co.*, 47 N. Y. 122. But see, *contra*, *Alexander v. Relfe*, 74 Mo. 495.

<sup>5</sup> *Mound v. Monmouthshire Co.*, 4 M. & G. 452; *Erie City Iron Works v. Barber*, 106 Pa. St. 125. And this, generally, though the particular act was willful and not directly authorized, or even against instructions. *Penn & c. Co. v. Waddle*, 100 Ind. 138; *Evansville v. McKee*, 99 Ind. 519; 81 Ind. 19.

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§ 289. **Negligent acts of agent.** — In the law of torts the rule *qui facit per alium facit per se*, applies, and as to all injuries resulting from the negligence of the agent's authorized acts, the principal is responsible.<sup>1</sup> An injury to an employee, from the negligent blasting of a superior servant, would render the principal liable,<sup>2</sup> so would the principal, generally, be liable for any injury done within the general scope of the agent's duties, although the particular act was not directly authorized, or even against instructions.<sup>3</sup> But as to acts not done by the authority of the principal and not within the apparent scope of the agent's employment, the negligent act would be the individual tort of the agent, and redress would have to be sought against him alone.<sup>4</sup>

§ 290. **Fiduciary relation — Secret profit.** — Where a party is acting as the agent of another, on account of the fiduciary relation existing, the law requires the fullest dis-

<sup>1</sup> Cooley Torts, 136, 142.

<sup>2</sup> Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151.

<sup>3</sup> Evansville &c. Co. v. Nicke, 99 Ind. 138. "In an action against the owners of a mine to recover damages for an injury sustained by an employee, if the complaint avers that the injury was caused by the negligence and want of skill of the engineer, and that the superintendent had full power to control the working of the mine, and employed and discharged all the workmen at his discretion, it must also allege that the defendants were negligent in employing the superintendent, or it does not state a cause of action." Collier v. Steinhart, 51 Cal. 116; M. M. D. 62.

<sup>4</sup> Cooley on Torts, p. 139. "A court of chancery cannot charge an agent who has committed a trespass in taking coal, although conscious of its being a wrong, with the proceeds of such trespass as compensation when his principal and not himself received such proceeds." Powell v. Alken, 4 Kay & J. 343; M. M. D. 11. "Compensation is not to be required of an agent of a mining company which has tortiously taken ore beyond its boundary, although it was his duty to prevent such acts." Stockbridge Iron Co. v. Cone Iron Works, 103 Mass. 80; M. M. D. 11.



closures to the principal.<sup>1</sup> Agents, whether acting for individual copartners or corporations, are not permitted to make secret profit out of their principals,<sup>2</sup> but are held to a strict account of all profits so realized.<sup>3</sup> An outstanding title to the principal's land, purchased by an agent, is held by him in trust for the principal;<sup>4</sup> a lease obtained for the principal will be so held by the agent;<sup>5</sup> all commissions made from sales of the principal's property must be accounted for;<sup>6</sup> an agent to sell cannot himself purchase the principal's property at a bargain;<sup>7</sup> nor could he purchase for a third party;<sup>8</sup> and any clandestine partnership by which a profit was realized, at the expense of the principal, would have to be accounted for.<sup>9</sup> But where the agency had terminated before the contract was entered into,<sup>10</sup> or a full disclosure had been made,<sup>11</sup> the agent would not be held to an account but would be permitted to claim the profits realized.

§ 291. Same — Sale may be avoided. — On the discovery of a contract whereby one has conspired to purchase the principal's property from the agent at a profit to the

<sup>1</sup> *Norris v. Taylor*, 49 Ill. 18; *Bispham's Pr. Eq.* 238, 239.

<sup>2</sup> *Simmons v. Vulcan Oil Co.*, 61 Pa. St. 202.

<sup>3</sup> *Beaumont v. Boulton*, 5 Ves. Jr. 485; *s. c.* 7 *Id.* 599; 11 *Id.* 358.

<sup>4</sup> *Hardenberg v. Bacon*, 83 Cal. 356.

<sup>5</sup> *Taylor v. Salmon*, 4 My. & Cr. 134.

<sup>6</sup> *Collins v. Case*, 23 Wis. 231. But it has been held: "Where plaintiff found gold while working for defendants in excavating a mill site on public land, defendants have no claims to the gold under Civil Code, § 1985." *Burns v. Clark* (Cal.), 66 Pac. Rep. 12. One who obtains a patent for mines upon the public land for himself and others, is held a trustee for the others. *Mullins v. Butte Co.* (Mont.), 65 Pac. Rep. 1004.

<sup>7</sup> *Cumberland Coal Co. v. Sherman*, 30 Barb. 558.

<sup>8</sup> *Cumberland Coal Co. v. Sherman*, *supra*.

<sup>9</sup> *Massey v. Davies*, 2 Ves. Jr. 317.

<sup>10</sup> *Van Dusen v. Star Min. Co.*, 36 Cal. 571.

<sup>11</sup> *Bispham's Pr. Eq.*, Secs. 238-239.

latter, the principal can avoid the sale,<sup>1</sup> or affirm it and recover the profit at his election.<sup>2</sup>

§ 292. **Agent cannot delegate authority.** — If the acts of the agent require the exercise of a personal discretion and judgment, he cannot delegate his authority unless he is authorized to do so.<sup>3</sup> But merely ministerial acts, which do not require the exercise of a personal discretion in the agent, can be performed by a sub-agent without any power to delegate authority,<sup>4</sup> and while this would not authorize a subordinate officer or agent of a corporation to appoint an attorney to attend to business of the company, if one is appointed by the agent, and the corporation does not disaffirm the act of its agent, his appointment would be valid.<sup>5</sup>

<sup>1</sup> *Cumberland Coal Co. v. Sherman*, 80 Barb. 558.

<sup>2</sup> *Beaumont v. Boulton*, 5 Ves. Jr. 485. "In an action by the purchaser of mining stock against the seller, on the ground that the stock was worthless and the sale induced by the fraudulent representations of the seller, one who had acted as plaintiff's agent in the purchase testified that, after she learned the truth as to the stock, she had a conversation with defendant: Held, that it was proper to permit the witness to be asked whether she relied on defendant's representations; the plaintiff having dealt solely through the agent, and having had no knowledge of the situation." *Geraghty v. Randall* (Colo. App. 1902), 70 Pac. Rep. 767.

<sup>3</sup> *Coles v. Trecothick*, 9 Ves. 274; *Brewster v. Hobart*, 15 Pick. 302; *Emerson v. Prov. Mfg. Co.*, 12 Mass. 237; *Warner v. Martin*, 11 How. (U. S.) 809; *Hunt v. Douglass*, 22 Vt. 128; *Grady v. Am. & C. Co.*, 60 Mo. 116; *Renwick v. Bancroft*, 56 Iowa, 527. But the agent's power to delegate his authority may be implied from the nature of the business. *Krumm v. Jefferson & C. Ins. Co.*, 40 Ohio St. 225; 75 N. C. 534.

<sup>4</sup> *Lord v. Hall*, 8 C. B. 627; *Gainwell v. Buchanan*, 1 Daly, 538; *Newell v. Smith*, 49 Vt. 255; *Eldridge v. Holway*, 19 Ill. 445.

<sup>5</sup> *Hillyer v. Overman Sil. Min. Co.*, 6 Nev. 51. But "when an attorney proposes to do the legal business of a mining company for a certain period for a certain rate per month, the mere fact that his bills at that rate for several months had been allowed and paid, though sufficient to raise a presumption of the acceptance of his proposition, would not overbear direct evidence that the proposition was not submitted to or acted upon by the company, and consequently never accepted." *Hillyer v. Overman S. M. Co.*, 6 Nev. 51; M. M. D. 19.

§ 293. **Revocation of authority.**— Unless the agent's authority is coupled with an interest, the principal can revoke his power at any time, even though the agency is expressly declared to be irrevocable.<sup>1</sup> But when a general authority is given an agent and is unlimited in point of time, then the authority will ordinarily continue until it is revoked.<sup>2</sup> And the death or subsequent insanity of either party will, of itself, work a revocation of the agent's authority,<sup>3</sup> but where the insanity is very slight, or unknown to persons dealing with the agent, the principal would not be justified in revoking his authority,<sup>4</sup> unless the agent was really incapacitated from discharging his duties connected with the employment or transaction for which he was engaged, and so the agency would generally be held to continue if the agent himself had an interest in the subject-matter of the agency and the accomplishment of his undertaking, other than as a mere agent, for in such case his interest would not be made to depend on the arbitrary will of the principal.<sup>5</sup>

§ 294. **Agents of corporations.**— Before a company is formed those engaged in forming it are not partners and are not each other's agents for doing that which may be necessary to form the company, and in order that a person engaged with others in forming a company may be held

<sup>1</sup> *McGregor v. Gardner*, 14 Iowa, 826; *Blackstone v. Buttermore*, 8 Smith (Pa.), 266; *Phillips v. Howell*, 60 Ga. 411; *Trumbull v. Nicholson*, 27 Ill. 149.

<sup>2</sup> *Ante, idem.* Tiedeman Com. Paper, § 80, p. 142.

<sup>3</sup> *Boone v. Clark*, 8 Cranch C. C. 389; *Gale v. Toppan*, 12 N. H. 145; *Scruggs v. Driver*, 31 Ala. 274; *Lehigh Coal Co. v. Mohr*, 2 Morris (Pa.), 228.

<sup>4</sup> *Hill v. Day*, 7 Stew. Ch. 150; *Drew v. Nurser*, 4 Q. B. D. 661; *Lehigh Coal & Co. v. Mohr*, 2 Norris (Pa.), 228.

<sup>5</sup> *Haggert v. Ranger*, 15 Fed. Rep. 860; *Hill v. Day*, 7 Stew. Ch. 150. But even though the agent has an interest in the subject-matter of the

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liable for their acts, he must have authorized them to do those acts as his agent or ratified the same subsequent to their commission.<sup>1</sup> Promoters of companies and members of provisional committees are not *prima facie* each other's agents, and in order to render any member liable for the acts of the others, the person who asserts that such liability exists must prove the existence of an authority emanating from the member in question to the others to bind him.<sup>2</sup> And authority is not presumed from the mere announcement and advertisement that the several persons sought to be charged are acting together for the purpose of forming a company.<sup>3</sup> But after the company is formed and the transaction of its business is intrusted to directors and managers appointed by the members of the company, they constitute such members the agents of the company, and are responsible for their acts within the usual scope of the corporate business.<sup>4</sup>

§ 295. Company not bound by acts of its members. — A joint-stock company or corporation is not, like an ordi-

agency, if the power could only be exercised in the name of the principal, the latter's death would terminate the agency, for, as observed by Lord Ellenborough, a valid act could not be done in the name of a dead man. *Watson v. Kirck*, 4 Camp. 272-274; *Clayton v. Merritt*, 52 Mass. 253.

<sup>1</sup> *Beach on Pri. Cor.*, § 160, p. 289; *Bailey v. Macauley*, 15 Q. B. 538; *Reynell v. Lewis*, 15 Mees. & W. 517; *Wilson v. Curzon*, 15 Mees. & W. 532; s. c. 5 Am. & Eng. Ry. Cas. 24; *Alger Prom. Cor.*, Ch. 1.

<sup>2</sup> *Patrick v. Reynolds*, 1 C. B. (N. S.) 727; *Beach on Pri. Cor.*, § 160, p. 290; *Burbridge v. Morris*, 3 Hurl. & C., 664; *Williams v. Piggott*, 2 Ex. 201; *Dawson v. Morrison*, 5 Am. & Eng. Ry. Cas. 62.

<sup>3</sup> *Beale v. Maule*, 10 Q. B. 976; *Ex parte Peele*, 6 Ves. 602. But how far the members may have ratified the acts of the promoters, so as to render them liable, is a question of fact for the jury. *Beach*, § 160.

<sup>4</sup> *Beach on Cor.*, § 161; 159; *Hurt v. Salisbury*, 55 Mo. 110. And the promoters would themselves be liable on contracts entered into by them

nary partnership, responsible for the acts of its members.<sup>1</sup> A shareholder of a company cannot bind the company for any representations he may make, or on any transaction he may enter into with a third party, for it is no part of the business of the company to make good the representations of a shareholder, as he is not the agent of the company for any purpose whatever,<sup>2</sup> and this principle applies to all kinds of mining companies, other than partnerships, whether they are incorporated or not.<sup>3</sup>

§ 296. **Power of superintendent—Supplies.**—The authority of a mine superintendent, or general agent, in charge of a mine, will be recognized, without proof, as empowering him to conduct all the local business of the principal, and in the absence of notice of a want of such authority, all persons dealing with such an agent have a right to infer that he has such general powers.<sup>4</sup> He has authority to employ laborers,<sup>5</sup> can buy supplies for the mine,<sup>6</sup> and generally perform such acts as may be necessary

for the company, unless the contracting parties were to look to the company when formed. *Beach on Cor.*, § 159; *Landman v. Entwistle*, 7 Ex. 682.

<sup>1</sup> *Boone on Cor.*, § 79. It is liable for its agents' acts, however, within the scope of their agency. *Boone*, 79; *Hay v. Cooper Co.*, 3 Barb. 42.

<sup>2</sup> *Beach on Cor.*, § 74, pp. 148-149. A shareholder cannot make valid contract in the corporate name. *Robinson v. Hemstreet*, 21 Fla. 342; *Beach, supra*; 1 *Lextors Ch. (N. J.)* 541.

<sup>3</sup> *See Cost Book Min. Co.* But unless the liability of members is limited by statute, the members of a joint-stock company are the same as partners. *See Blanchard & Weeks Ld. Cas.*, p. 540 *et seq.*; *Dickinson v. Valpy*, 10 B. & C. 128.

<sup>4</sup> *Adams Min. Co. v. Senter*, 26 Mich. 73. "The agent in charge has, under his general and implied powers, the right to let short leases of the ground in blocks or parcels." *Bicknell v. Austin Co.*, 62 Fed. 432; *Mor. Min. Rts.* (10 Ed.) 292.

<sup>5</sup> *Consolidated Gregory Co. v. Raber*, 1 Colorado, 511.

<sup>6</sup> *Hawken v. Bourne*, 8 M. & W. 708.

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to carry on the mining operations.<sup>1</sup> But such agent cannot bind his principal for borrowed money,<sup>2</sup> nor on commercial paper not necessary to carry on the mining undertakings,<sup>3</sup> or would he have any authority, by virtue of his position, to alter the terms of a contract entered into by his principal.<sup>4</sup>

§ 297. **Directors the agents of company.** — The directors of the company, and such other persons as may be intrusted with the management of its affairs, are its only agents;<sup>5</sup> and the company is bound by the acts of its directors if they are in the real or apparent scope of their authority.<sup>6</sup> And the power of the directors to bind the company is not affected by any irregularity of their own appointment, or by any irregularity of their manner

<sup>1</sup> *Tredeven v. Bourne*, 8 M. & W. 461. "An agent, in possession as agent of an interest in a mining ditch, is not personally liable for the rent." *Stewart v. Perkins*, 3 Oreg. 508; M. M. D. 10.

<sup>2</sup> *Ricketts v. Bennett*, 4 C. & B. 686.

<sup>3</sup> *Dickinson v. Valpy*, 10 B. & C. 128; *Tiedeman Com. Paper*, Sec. 96, p. 164.

<sup>4</sup> *Lonkey v. Succor M. & M. Co.*, 10 Nev. 17. "A superintendent of a mining company has no right, by virtue of his position, to moderate the terms of a written contract, which a third party and his company had entered into concerning the furnishing of materials for sinking a shaft." *Lonkey v. Succor M. & M. Co.*, 10 Nev. 17; M. M. D. 10. "The manager and superintendent of a mining company, who was also a stockholder and director, and who as such took part in procuring loans secured by mortgages on the property, and expended the money received in and about the same without informing the mortgagees that he claimed a miner's lien for his services, could not be estopped from asserting that such lien was prior to the mortgages, where it did not affirmatively appear that the mortgagees were in any manner misled to their prejudice by his conduct." Judgment (1900), 84 N. W. 211, modified on rehearing. *Sutton v. Consolidated Apex Min. Co.* (S. D. 1902), 89 N. W. 1020.

<sup>5</sup> *Boone on Cor.*, § 139, p. 199.

<sup>6</sup> *Boone on Cor.*, § 142; *Beach on Pri. Cor.*, § 227-248.

of procedure, provided their acts were within the scope of their corporate powers, if the person dealing with them acted in good faith and without notice of the irregularity.<sup>1</sup> But each director cannot bind the company by his own individual act, and unless the proper number have acted, the company will not be held responsible.<sup>2</sup>

§ 298. **Agents appointed by directors.**—Where agents are appointed by the directors of a company to transact business for the company, the company will be bound by their acts, unless their employment was beyond the power of the directors, or the appointment was irregularly made and the parties dealing with the agent had notice of the irregularity of his appointment.<sup>3</sup> But where the directors of a mining company appoint a person agent of the company, as between the agent himself and the company, if he acts in good faith and without notice of the irregularity of his appointment, the company will be liable to such agent, in an action for his salary, although he may not have been appointed in precisely the manner prescribed by the regulations of the company.<sup>4</sup>

§ 299. **Same — Limitation upon authority.**—In determining questions between third parties and principals

<sup>1</sup> Beach on Cor., §§ 288 *et seq.*

<sup>2</sup> Buell v. Buckingham, 16 Iowa, 284; Boone on Cor., § 65. But if a legal quorum is present, a majority of the quorum may act. Boone, *supra*; Booker v. Young, 12 Gratt. 308. See Pittman v. Lead Co. (Mo. App. 1902), 67 S. W. 946.

<sup>3</sup> Van Dusen v. Star Q. M. Co., 36 Cal. 571. And whether the agency exists is a question of fact. Kersey v. Northlight Oil Co., 45 N. Y. 505. The agency may be proven by parol. Hardenberg v. Bacon, 33 Cal. 356; Carey v. Phil. Pet. Co., 33 Cal. 694.

<sup>4</sup> And if the company should prevent him from performing his contract with the corporation he could recover on a *quantum meruit* for the work done. Isaacs v. McAndrew, 1 Mont. 437.

as to the latter's liability for acts of the agent, the nature and extent of the agent's authority, whether it extends to the act in question or not, is competent and material evidence as bearing upon the question of ratification or express appointment by the principal, and can be introduced by either party, to determine such liability.<sup>1</sup> If the act of the agent, whether arising from contract or tort, is within the scope of his agency and employment, the principal is liable, but if he has exceeded his authority, and especially if the contracting party had notice thereof, he would not be liable.<sup>2</sup>

§ 300. **Agents who exceed authority.** — Directors of a company, as well as other agents, are personally liable if they exceed the limits of their authority.<sup>3</sup> But agents are not liable for an honest mistake as to the limits of their authority, and if a person trades with the directors of a company, and knows they have exceeded their authority, he cannot complain if their acts are afterwards repudiated

<sup>1</sup> *Union Mining Company v. Rocky Mountain Bank*, 2 Colo. 248, 565; 1 Colo. 531; *Morrison's Min. Dig.*, p. 9. But the statements of an agent are not evidence against the principal of the agency. *Van Dusen v. Star Q. Min. Co.*, 86 Cal. 571. "A driver in a coal mine changed places with a coal digger, which fact was known to the boss of the mine, who had no authority to employ diggers: Held, that there was no ratification of the employment of the driver as a digger, neither the owner nor superintendent having knowledge thereof." *Patterson v. Neal* (Ala. 1902), 83 So. Rep. 89.

<sup>2</sup> *Atty.-Gen. v. Jackson*, 5 Hare, 855. "When an agency is special, the authority must be strictly pursued, and the principal is not bound if the agent exceeds it." *Young v. Harbor Point Ass'n* (Ill. App. 1901), 99 Ill. App. 290.

<sup>3</sup> *Smart v. Ilberry*, 10 M. & W. 1-9; *Duncan v. Nells*, 32 Ill. 542; *Hall v. Crandal*, 29 Cal. 572; *Kroeger v. Pitcairne*, 5 Ont. (Pa.) 311. And if he guarantees his authority, or if the persons dealing are ignorant of his authority, he is generally liable if he exceeds same. *Tiede. Com. Paper*, § 84, p. 149.



by the company.<sup>1</sup> However, if directors, or other agents, contract as principals, they will be bound personally by their contract, if it is not illegal, and the fact that the contract is one which would not bind the principal, will not, of itself, relieve the agent from his personal liability.<sup>2</sup> And it has been held that the agent is personally liable on a contract to which he fails to affix the name of his principal, even though he should add the word "agent" to his own signature, such suffix being regarded as a mere *descriptio personae*, and not any notice of the limitation of his liability arising from the agency.<sup>3</sup> But this doctrine is not universally adhered to, and adding the title of agent to his signature has been held a sufficient notice to the party dealing with the agent that he does not mean to be personally liable.<sup>4</sup>

§ 301. Agents in judicial proceedings. — In legal proceedings, incorporated companies act by their agents appointed under seal. The directors of a mining company have full power to institute and defend actions in the company's name, unless some particular officer of the company is, by the company's rules, or a special statute, given

<sup>1</sup> Lindley on Part.; Whitney v. Wyman, 101 U. S. 392; Ware v. Morgan, 67 Ala. 461; Beach, § 227.

<sup>2</sup> Toledo Iron Works v. Heisser, 51 Mo. 128; Kenyon v. Williams, 19 Ind. 45.

<sup>3</sup> Toledo Iron Works v. Heisser, 51 Mo. 128; Williams v. Robbins, 16 Gray, 77; Graham v. Campbell, 56 Ga. 258; Bryson v. Lucas, 84 N. C. 280; Kenyon v. Williamson, 19 Ind. 45; Anderson v. Pearce, 36 Ark. 393.

<sup>4</sup> Conro v. Port Henry Iron Co., 12 Barb. 28; s. c. Mor. Min. Dig., p. 11. Also Motte v. Hicks, 1 Con. 538; Hicke v. Hind, 9 Barb. 531; Babcock v. Benson, 1 Kern, 200; Hager v. Rice, 4 Colorado, 90; Tiede. Com. Pap., § 85. "Where an agent's authority is limited to purchasing with cash furnished him by his principal, and he buys on credit, his principal is not liable for the price of things so bought." American Oil Co. v. Gurr, 40 S. E. 780 (Ga., 1902).

authority to appear for the company;<sup>1</sup> and it has been held that a bond given to secure costs, in an action to which an incorporated company is a party, filed in the regular course of legal proceedings, is not beyond the power of the directors to make.<sup>2</sup> The directors can be examined on interrogatories in an action against their company; and if the company has infringed upon the rights of any other mining corporation or company, the costs and damages resulting from the suit can be assessed against them.<sup>3</sup>

<sup>1</sup> Boone on Cor., §§ 46-147. But all actions for the company must be brought in corporate name; *ante*.

<sup>2</sup> Beach on Pri. Cor., 859 *et seq.*

<sup>3</sup> *Ante, idem.* Yohoola R. M. Co. v. Irby, 40 Ga. 479; Kieley v. Belcher Sil. Min. Co., 3 Saw. 487.

## CHAPTER XX.

### MINING CORPORATIONS.

- SECTION 302.** How created.
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  - 320. Authority of the president.
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  - 324. Liability for torts of agents.
  - 325. Same — Miscellaneous cases.
  - 326. Power to remove and disfranchise.
  - 327. How dissolved.

§ 302. How created. — Most of the States in the Union provide for the creation and organization of different kinds of corporations by statute,<sup>1</sup> and when a corporation is organized in a State possessing such a statute, the organizers or promoters of the corporation must conform to the requirements of the statute of the State where the corpo-

<sup>1</sup> See Statutes.

ration is to be organized.<sup>1</sup> If the corporation is not organized according to the State statute, it is held to be void in law, and cannot afterwards have legal existence, even though the legislature of the State should pass a special act, in recognition of the validity of the organization.<sup>2</sup> It would seem, however, that the authority to create would necessarily have the power to dispense with the formalities to be observed in the creation, and since, in this country, corporations can only be created by authority of the legislature, there is no reason why a corporation could not exist by prescription, which would presuppose a previous legal organization, or by a subsequent action of the legislature dispensing with the formalities to be observed in the original organization, and in recognition of the legal creation of the corporation.<sup>3</sup> Mining, like other business corporations, are created by a charter from the State or United States government, which is in the nature of a grant of the rights and privileges necessary for carrying out the purposes of the undertaking.<sup>4</sup> The words generally used

<sup>1</sup> *State v. Curtis*, 9 Nev. 325; 10 *Id.* 141; same, 167; *Indianapolis Fur. M. Co. v. Herkimer*, 46 Ind. 142; *In re Lancaster Min. Co.*, 80 Pa. St. 151; 64 Pa. St. 43.

<sup>2</sup> *Makeluma Hill Co. v. Woodbury*, 14 Cal. 424; *Orobelle & Co. v. Plumas Co.*, 37 Cal. 354; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416. But see, *contra*, as to legislative recognition, *Kanawa C. Co. v. Kanawa O. C. Co.*, 7 Bl. C. C. R. 391; *Basshor v. Dressel*, 34 Md. 508.

<sup>3</sup> *Kanawa C. Co. v. Kanawa O. C. Co.*, 7 Bl. C. C. R. 391; *Basshor v. Dressel*, 34 Md. 508; *People v. Sierra Buttes Co.*, 39 Cal. 511.

<sup>4</sup> *Frost v. Frostburg C. Cor.*, 24 How. 278. As to what is necessary to establish existence of corporation, see *Abbott v. Omaha Co.*, 4 Neb. 416. When existence of the corporation is denied there must have been a substantial compliance with the statute (*Makeluma Hill Co. v. Woodbury*, 14 Cal. 424); but as to such acts as are not prerequisite to the assumption of corporate powers and the right of others than the government to raise the question, see, *Donnebroge I. M. Co. v. Allment*, 26 Cal. 386; *Doyle v. Peerless Petroleum Company*, 44 Barb.

in the creation of corporations are "found," "establish," or "incorporate," sometimes one and sometimes another being employed; but no particular words are necessary to constitute a valid creation,<sup>1</sup> and it is generally held sufficient if the assent of the State or government can reasonably be implied from the words used;<sup>2</sup> and where certain rights and privileges have been legally granted to a collection of individuals, under one name, to carry on mining operations at a given place, if such operations could not be carried on and the rights and privileges exercised, unless in a corporate capacity, the persons to whom the grant had been made, would be considered a corporation, as far as would be necessary to permit them to enjoy the rights previously granted.<sup>3</sup> And if such rights had been granted under an act of incorporation, and the persons to whom the grant was made held meetings, adopted by-laws and perfected other corporate arrangements, this would be held sufficient to enable the company to take and hold property, although there had been no record of a formal acceptance of the charter.<sup>4</sup>

239. As to burden of showing organization, see *Warner v. Daniels*, 6 Mor. Min. Rep. 436.

<sup>1</sup> *Beach Priv. Cor.*, Chap. I. As the organization of corporations in the various States is now generally controlled by general statutes, the corporation is legally formed and its existence dates from the time of the compliance with the statute. *Coyote Min. Co. v. Ruble*, 4 M. M. R. 88; *Abbott v. Omaha Co.*, 4 M. M. R. 8; *Makeluma Hill Co. v. Woodbury*, 14 Cal. 424.

<sup>2</sup> *Abbott v. Omaha Co.*, *supra*; *Indianapolis Furnace Co. v. Herkimer*, 46 Ind. 142; *Beach on Priv. Cor.*, Chap. I.

<sup>3</sup> Ordinarily a charter or law conferring the franchise and a user thereunder will be held sufficient. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416.

<sup>4</sup> *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385. As to taking property before organization and validity of conveyance, see *Vermont M. & Q. Co. v. Windham Bank*, 44 Vt. 489; *Snow v. Thompson Oil Co.*, 3 Mor. Min. Rep. 15. And as to existence of cause of action prior to or-

§ 303. **Name and place.** — In order to constitute a corporation, the organization to be incorporated must have been given a name before it can properly perform its corporate functions.<sup>1</sup> A name may be acquired by usage, or assumed by implication, if none is expressly given the corporation,<sup>2</sup> but when it is given a name by the charter, the corporation cannot, as a general rule, perform any corporate act, by any other name than that given by the charter;<sup>3</sup> and while the name of a corporation may be changed by action of the legislature, the change would not affect the rights of third parties acquired before the change occurred, provided the identity of the corporation still appeared.<sup>4</sup>

ganization and subsequent right of corporation on creation, see *Snow v. Thompson Oil Co.*, *supra*; 59 Pa. St. 209. "Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation." *Indianapolis Furnace & M. Co. v. Herkimer*, 46 Ind. 142; M. M. D. 47. "The right of a company, doing business as a corporation *de facto*, and claiming in good faith to be a corporation under the laws of this State, to act as a corporation cannot be inquired into collaterally in a private action to which the corporation *de facto* may be a party." *Dannebroke G. Q. M. Co. v. Allment*, 26 Cal. 286; M. M. D. 48. "If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or specific laws, the question is one of law, and it is for the State alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises." *Doyle v. Peerless Petroleum Co.*, 44 Barb. 239. "It cannot be shown in a collateral proceeding that a corporation (mining) has forfeited its charter." *Crump v. U. S. M. Co.*, 7 Gratt. (Virg.) 352; M. M. D. 48.

<sup>1</sup> *Ex parte Harrison*, 3 Mont. & Ayr. 506. But as to immaterial misnomer see *People v. Sierra Buttes M. Co.*, 33 Cal. 511.

<sup>2</sup> *Harrison v. Heathary*, 6 Scott N. R. 735; 12 J. C. P. 282.

<sup>3</sup> *Davis v. Flagstaff Co.*, 2 Mor. Min. Rep. 660; *Merrick v. Peru Mining Co.*, 3 Mor. Min. Rep. 584.

<sup>4</sup> In other words, although the new company would take the property of the old, it would also succeed to its liabilities as to third parties. *Bardsdale v. Finney*, 14 Grattan, 338; *Miners Ditch Co. v. Zel-*

And where a mining company, after a change in its corporate name by the legislature, still continued its mining operations and retained the same officers, the rights of third parties were held not to be affected by the change, and the corporation, under its new name, would be responsible for all the debts that it had previously contracted.<sup>1</sup> A corporation must also have some place for carrying on the business for which it is chartered,<sup>2</sup> and since it can have no legal existence beyond the boundaries of the State or government by which it was created, it must limit its business operations to the place of its creation.<sup>3</sup> The corporators cannot act legally at a meeting held beyond the limits of the State granting the charter,<sup>4</sup> but a corporation, acting legally at the place of its creation, can, through its directors or by agents legally authorized, have its votes transmitted elsewhere, and act or contract beyond the

lerbach, 37 Cal. 543. Nor could the rights of a stockholder to the stock be defeated by consolidation of his corporation with another, but he would become a stockholder to the extent of his holdings in the old company in the new one. *People v. Mining Co.*, 33 Mich. 2. "The omission of the word 'Mining' in the name of the 'Sierra Buttes Quartz Mining Company,' in an assessment roll: *Held*, not a fatal discrepancy. *People v. Sierra Buttes M. Co.*, 39 Cal. 511; M. M. D. 48. Instance of the exercise of mining franchises under a corporate name indicating other purposes, *e. g.*, 'The Stanhope and Tyne Railway Company.' *Ex parte Harrison*, 3 Mont. & Ayr. 506; M. M. D. 48.

<sup>1</sup> *Dean v. LaMotte Lead Co.*, 59 Mo. 523; *Barksdale v. Finney*, 14 Grattan, 338; *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543; *People v. Minory M. Co.*, 33 Mich. 2.

<sup>2</sup> *Camp v. Byrne*, 41 Mo. 525; *Harris v. McGregor*, 29 Cal. 124; *Boone Cor.*, Chap. I.

<sup>3</sup> *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 34. Meetings must be in accordance with charter. *State v. Curtis*, 9 Nev. 325.

<sup>4</sup> The charter and by-laws control it. *State v. Pettinelli*, 10 Nev. 141, reported as *State v. Cettinelli*, 12 M. M. R. 513. But see *Humphrey v. Mooney*, 4 Mor. Min. Rep. 76, where it is held a meeting beyond the State cannot be collaterally attacked.

limits of the State that had granted the charter.<sup>1</sup> And a corporation organized in one State for the purpose of transacting business in another, will not be treated as a corporation, but as a mere partnership, in the latter State; but if the corporation is chartered in both of the States, and has property in each, it would be treated as a domestic corporation by the courts of each State, to the extent of the property held in the name of the corporation, in each State, but as a foreign corporation in respect to the property beyond that State.<sup>2</sup>

§ 304. **Residence of corporation.** — It frequently becomes of considerable importance to determine the exact place of residence of a corporation, not only to determine the place where the corporate property would be subject to taxation, but also to ascertain the place for bringing suits. A corporation is generally regarded as a resident of the State where it is created, and this, regardless of the residence of the members of the corporation;<sup>3</sup> and the corporation can have no legal existence beyond the boundary of

<sup>1</sup> *Bassett v. Monte Cristo Co.*, 4 M. M. R. 108; *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 84. In *Humphreys v. Mooney* (4 M. M. R. 76), it is held that corporate minutes of meeting outside the State cannot be collaterally attacked and are valid, if in accordance with charter.

<sup>2</sup> *Maryland v. Northern Ry. Co.*, 18 Md. 198. The power of corporations to hold property, however, is only limited by their charter or necessary implications. *Moss v. Rossu Co.*, 1 M. M. R. 289; *Davis v. Flagstaff Co.*, 2 *Id.* 660. Powers over property are unlimited. *Ordoso Co. v. N. Amer. Co.*, 8 M. M. R. 590. As to constitutionality of conditions on the right of foreign corporations to sue, see *Utley v. Clark-Gardner Mining Co.*, 4 Mor. Min. Rep. 39. May sue without filing certificate. *Idem.* Where the prohibition is against doing business, any transaction is a violation of the statute. *Mullens v. Amer. &c. Co.*, 88 Ala. 280; 7 So. Rep. 201; *Com. v. Delaware &c. Co.*, 123 Pa. St. 594; 16 Atl. Rep. 584. But see, *contra*, *Colo. Iron Works v. Sierra Grande Mining Co.*, 15 Colo. 499; 25 Pac. Rep. 325; *Copper Co. v. Ferguson*, 113 U. S. 727.

<sup>3</sup> B one on Cor., Sec. 33 and cases cited.



the State where it was originally created, although it may act in other States by regularly appointed agents to carry on the business under the laws of such foreign State.<sup>1</sup> As regards the exact location of the residence of the corporation, in the State where it was created, the place of residence is usually where the principal office of the corporation is located or where its principal business is carried on; where the profits are received by the different members of the corporation, and where the chief officers are to be found.<sup>2</sup> It is not essential that all of these should be found in any one location, in order to establish the residence of the corporation; nor is it premised that the residence of the corporation would be where any one exists, for there can be but one place of residence for every corporation; but these are the tests usually given for determining the location of the residence, and a great deal depends upon the character of the corporate business, as to what would be considered the residence of the corporation. Citizenship, like that enjoyed by individuals, cannot be predicated of a corporation, for they are mere creatures of the local law, and have no right of legal recognition in other States, except such as arises from the courtesy of laws, and the judicial recognition that corporations engaged in interstate commerce are entitled to receive. But

<sup>1</sup> If it acts in violation of the laws of such State, it acquires no legal status and cannot use the courts of such State. *Chattanooga &c. Co. v. Denson* (U. S. Sup. Ct. March, 1903), 23 Sup. Ct. Rep. 630; *Dunaway v. Day*, 163 Mo. 415; *Erhardt v. Robertson Bros.*, 78 Mo. App. 404. The directors are required to meet within the State of the existence of the corporation, and a meeting held elsewhere is void. *Beach Priv. Cor.*, Sec. 285; *Smith v. Silver Valley Min. Co.*, 64 Md. 85; *Franco-Tiepan Land Co. v. Laigle*, 59 Texas, 339. But the proceedings of such illegal meeting may be ratified at a legal meeting. *Smith v. Silver Valley Min. Co.*, *supra*.

<sup>2</sup> *Ante, idem.*

where a corporation is chartered by two different States, if it has property in both States, it will be considered a domestic corporation by each State, to the extent of the property found in each, and as a foreign corporation in respect to the corporate property beyond the boundaries of each State.<sup>1</sup>

§ 305. **Corporate seal and by-laws.** — At common law a corporation could only act by its common seal; but this rule does not apply to corporations created by statute;<sup>2</sup> and although a seal is generally considered one of the incidents to every corporation, a corporation may exist and transact business without a seal, and where it has power to do so, it may enter into contracts, like a private individual, either with or without a seal.<sup>3</sup> If a corporation has a seal, the seal is always evidence of the assent of the corporation to the act of the agent; the corporation would not be bound by a specialty contract, unless its seal is affixed to the instrument,<sup>4</sup> and when it is so affixed, it should be accompanied with the declaration that it is the seal of the corporation, together with the signatures of the president and secretary of the company.<sup>5</sup> The

<sup>1</sup> Boone on Cor., Sec. 83. An interesting case has recently been decided in Minnesota, in the trial of which it developed that the residence of the corporation was purposely located beyond the limits of an incorporated town, for the sole object of avoiding the liability of the municipal tax, although it continued to transact its business and realize its profits from the city.

<sup>2</sup> Curry v. Bank of Mobile, 8 Part. (Ala.) 861; Durham v. Carbon Co., 15 M. M. R. 380; So. Ireland Co. v. Waddell, 3 Id. 535.

<sup>3</sup> Wolf Creek Co. v. Schultz, 3 M. M. R. 95; South of Ireland Co. v. Waddell, 3 M. M. R. 533. But see, *contra*, in Mo., Sess. Acts 1895, abolishing all but corporate seals.

<sup>4</sup> Copper Miners of E. v. Fox, 16 Q. B. 27.

<sup>5</sup> Miners Min. Co. v. Rocky Mt. Bk., 2 Colo. 248, 565; Goshmiller v. Willis, 33 Cal. 11.

power to make by-laws for the government of the corporation is usually conferred by the charter to the corporation, and where the authority is expressly given by the charter, the corporation cannot make by-laws for purposes other than those specified in the charter.<sup>1</sup> The power to make by-laws is usually delegated to the directors of the corporation, and where the charter prescribes the manner in which the by-laws are to be made, its provisions in that regard, must be strictly followed by the directors.<sup>2</sup> If the charter does not prescribe the manner to be followed in the adoption of the by-laws, they may be adopted by an action of the officers of the company, by express vote of the directors, or in any other manner not contrary to the provisions of the charter.<sup>3</sup> A by-law made in pursuance of the charter of the corporation, binds not only the members of the company, but all other persons who are acquainted with its manner of doing business;<sup>4</sup> but a by-law would not be considered legal, which was manifestly unjust and unreasonable; or one that was contrary to the laws of the State, the common law, or the constitutional law of the land.<sup>5</sup>

<sup>1</sup> *State v. Curtis*, 3 Mor. Min. Rep. 630. But a compliance with the charter, in the absence of evidence to the contrary, is presumed. *Colonial Bk. of Australasia v. Willon*, L. R. 5 P. C. 417.

<sup>2</sup> *Flagg v. Lady Bryon Min. Co.*, 4 Nev. 406. But see *State v. Curtis*, 9 Nev. 325; *State v. Wright*, 10 Nev. 169; *State v. Pettinell*, 10 Nev. 141.

<sup>3</sup> By-laws irregularly adopted may be made valid by user. *State v. Curtis*, *supra*, where they were adopted by the stockholders only.

<sup>4</sup> *Beach on Cor.*, Chapter I.; *Cherokee Iron. Co. v. Jones*, 8 M. M. R. 626. But see *Sullivan v. Trimfo G. & S. Min. Co.* (29 Cal. 585), where a by-law preventing a debt of over \$10,000.00 was held not to preclude an assessment in excess of this sum to pay "legal and proper expenses."

<sup>5</sup> *Mogle v. Makeluma M. Co.*, 5 Cal. 258; *Horts v. Brown*, 77 Ill. 226. The same rule applies as to mining rules and customs. *Jupiter Co. v. Bodie Co.*, 4 M. M. R. 411; *McCormack v. Varnes*, 9 M. M. R. 505. Legality of by law a question for the court. *Ralson v. Plowman*, 5 M. M.

§ 306. **Meetings and records.** — As a general rule, the business of a corporation, relating to corporate affairs, can only be transacted at a meeting of the directors, or corporators, convened by some one who has authority to call a meeting of the corporation.<sup>1</sup> If the charter requires a special notice to be given, it should be given a reasonable time before the meeting, stating the time and place at which it is to be held,<sup>2</sup> and if the proper notice has not been given, the members are not bound by the business transacted at the meeting.<sup>3</sup> But if the charter does not require a special notice to be given, when a stated time of meeting has been established, the members are presumed to have notice of that time and could by agreement dispense with the necessity of a formal notice.<sup>4</sup> A reasonable notice, however, should always be given of a special meeting of the corporation, and if certain of the members do not have the proper notice of a special meeting, they cannot be bound by any action taken at such meeting;<sup>5</sup> but if a meeting of the corporation is regularly convened, a majority of the stock represented at such meeting controls the action of the company, and the minority must yield to the will of the majority, even though a majority of the stock is controlled by a few persons who have com-

R. 160; *Waring v. Crow*, 5 Mor. Min. Rep. 205. And even though an act was in contravention of the by-laws, strangers dealing with the corporation without knowledge, would be protected, if the stockholders assented to the act. *Kent v. Quicksilver Co.*, 4 M. M. R. 47. But see *McCulloh v. Moss*, 18 *Id.* 440.

<sup>1</sup> *State v. Pettinell*, 10 Nev. 141; *State v. Wright*, 10 *Id.* 167.

<sup>2</sup> *Hill v. Rich Hill Coal Co.*, 119 Mo. 9; *U. G. M. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 582.

<sup>3</sup> *State v. Pettinell*, *supra*; *s. c.* 12 Mor. Min. Rep. 518; *Hill v. Rich Hill Coal Co.*, 119 Mo. 9.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *State v. Pettinell*, 10 Nev. 141; *Hill v. Rich Hill Coal Co.*, 119 Mo. 9.

bined to secure the management of the corporation's property.<sup>1</sup> It is sometimes provided by charter, and is generally customary for corporations to keep a stock book, upon which the stock of the members can be transferred, also a book containing a record of the different meetings of the company and the business there transacted. But a failure to record the authorized acts of the agents of a corporation does not affect the validity of such agents' acts, unless the charter or some organic law expressly provides for the registration of their acts,<sup>2</sup> and if the minutes of a corporate meeting cannot be found, it is generally competent to prove by parol evidence, the business transacted at that meeting.<sup>3</sup>

§ 307. **Corporate stock — Transfer of.** — Generally any promise to take stock in a corporation, if based upon a valuable consideration, can be enforced, as any other contract, and in subscriptions and agreements for stock, as in the construction of other contracts, the courts look rather

<sup>1</sup> This was not the rule at common law. *Gregg v. Granby Mining & S. Co.*, 164 Mo. 616; 65 S. W. Rep. 312; *Harrison v. Heathery*, 6 Scott N. R. 785. "The election of a trustee of a mining corporation is a corporate act, and must be conducted in the manner required by the charter." *State v. Curtis*, 9 Nev. 325; M. M. D. 49. "An election at which all the stockholders are present, but a portion decline to participate, the same being held without the action of such presiding officer as the by-laws prescribed, is not a legal election." *State v. Pettinelli*, 10 Nev. 141. "It is the legal right of any stockholder of a mining corporation that an annual election of trustees be held, without regard to the number of shares such stockholder may have." *State v. Wright*, 10 Nev. 167; M. M. D. 57.

<sup>2</sup> *Wood Hyd. H. M. Co. v. King*, 45 Ga. 84. All acts of officers are valid as to third persons, who had a right to demand the given act or who paid a consideration for it. *Savage v. Ball*, 17 N. J. Ch. 143.

<sup>3</sup> *Union Min. Co. v. Bank*, 2 Colo. 248. Or the corporate minutes may be corrected by parol evidence of what actually occurred at the meeting. *Gilroy Quartz Min. Co. v. Gilroy*, 51 Cal. 341.

to the intention of the parties than to the manner in which the same is expressed.<sup>1</sup> A certificate of stock is not a necessary prerequisite to membership in a corporation,<sup>2</sup> nor is the liability of a member dependent upon the possession of a certificate of stock alone, for the certificate is only evidence of the ownership of the stock, and without a transfer on the books of the corporation the certificates would be of no effect,<sup>3</sup> and a duly registered shareholder can exercise the privileges of a stockholder, even though he may not hold a certificate of stock.<sup>4</sup> The stock of all corporations, whether their property consists of real or personal estate, is deemed personal property and like other species of personal property may be disposed of at the will of the owner.<sup>5</sup> And any contract for the transfer of stock whether for a future or present transfer, if based upon a valid consideration, can be enforced.<sup>6</sup> But a transfer of stock does not carry dividends already de-

<sup>1</sup> *Beach Cor.* (vol. 2), §§ 543 and 544; *Boston &c. Ry. Co. v. Wellington*, 118 Mass. 79; *Oler v. Baltimore &c. R. Co.*, 41 Md. 588; *Duchess Co. v. Mobbett*, 58 N. Y. 379.

<sup>2</sup> *Beach on Cor.*, §§ 62-104.

<sup>3</sup> *Beach on Cor.*, §§ 62-66-104, 612; *Hawley v. Brannigan*, 83 Cal. 394; *Cin. &c. Ry. Co. v. Pearce*, 28 Ind. 502. But see, *contra*, *Dain Mfg. Co. v. Trumbull Co.*, 95 Mo. App. 144 (1908).

<sup>4</sup> *Beach*, § 612, p. 972; *Kebogum v. Jackson Iron Co.*, 76 Mich. 498; *Mitchell v. Beckman*, 64 Cal. 117.

<sup>5</sup> Property exchanged for the stock in a corporation should be reasonably worth the amount of stock issued therefor. *Kelly v. 4th of July Min. Co.*, 21 Mont. 291; 42 L. R. A. 621; 58 Pac. Rep. 959; *Beach*, § 612 and cases cited. "The courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where the payment for such stock has been made in money or its equivalent. *Dean v. Baldwin*, 99 Ill. App. 582. An act authorizing lands as well as money to be considered as payment upon the capital stock of a mining company does not authorize a leasehold interest to be treated as such payment." *Bashorr v. Dressel*, 84 Maryland, 503; M. M. D. 349.

<sup>6</sup> *Beach*, § 618. But vendor must first vest title of stock in vendee. *Ante, idem*; *White v. Salisbury*, 88 Mo. 150.

clared thereon, for the dividend would belong to the owner of the stock when the same was declared,<sup>1</sup> and the owner of the stock at the time when the dividend was declared, would be entitled to the dividend, even though it should be made payable at a date subsequent to the transfer of the stock.<sup>2</sup>

§ 308. **May sue and be sued.** — A corporation has the capacity to sue or be sued like a private individual, and can institute suit and maintain actions on debts or other obligations due the corporation when the same are within the general scope of the authority conferred upon the corporation by its charter, in any court of competent jurisdiction.<sup>3</sup> Corporations are not liable, however, for offenses against the person, or for acts which derive their criminality from evil intention;<sup>4</sup> but aside from this they are liable, the same as an individual, for their torts,<sup>5</sup> or other civil injuries by which another is disturbed in the enjoyment of his legal rights, and the tendency of modern legislation has been to extend the liability of private corporations and hold them, as far as possible, to their legal duties and responsibilities.<sup>6</sup> A mining cor-

<sup>1</sup> *Hyatt v. Allen*, 56 N. Y. 553; *Harper v. Raymond*, 8 B. & S. W. 29.

<sup>2</sup> *Boardman v. Lake Shore &c. Co.*, 84 N. Y. 157; *Beach Cor.*, § 619 and cases cited; *American Alkali Co. v. Campbell*, 118 Fed. Rep. 398; *Berry v. Rood*, 67 S. W. 644.

<sup>3</sup> A mining corporation may sue its own directors for their frauds on the corporation, in its own name. *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202.

<sup>4</sup> In such case the corporate agents would be personally liable.

<sup>5</sup> *Kielly v. Belcher Silver Min. Co.*, 8 Saw. 437. They are liable, in trespass, for wrongfully having timber cut. *Yahoola River Mining Co. v. Irby*, 40 Ga. 479.

<sup>6</sup> In Nevada it has been held an injunction will lie to restrain a mining corporation from making a transfer of lost shares of stock. *Sierra Nevada Mining Co. v. Lears*, 10 Nev. 346.

poration may be guilty of a nuisance in the way it conducts its mining operations and, as in the case of a private individual, the wrong may be redressed by an indictment preferred against the corporation.<sup>1</sup> But a mining corporation cannot institute suit, in the absence of special authority given it in its charter, by less than a majority of the directors or trustees of the corporation.<sup>2</sup> Where there is no proof, however, that the corporation acted without the proper authority, the assent of a majority of the trustees or directors of the company would be presumed, and the *onus* of showing the absence of the proper authority would be upon the party who denied the authority in the corporation.<sup>3</sup>

§ 309. **Right to buy and sell property.** — A mining corporation, like any other private corporation, can purchase

<sup>1</sup> *Commonwealth v. Nashua &c. Co.*, 2 Gray, 54; *Terre Haute Gas Co. v. Teel*, 29 Ind. 181.

<sup>2</sup> *Hort v. Houston*, 22 Ga. 507. For enforcement of assessment see *Amer. Alkali Co. v. Campbell*, 118 Fed. Rep. 898.

<sup>3</sup> *Bangor &c. Co. v. Smith*, 49 Me. 84. "In all proceedings between corporations and third parties, a compliance with its charter in the absence of a contrary showing is presumed." *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417; *Sly v. Palo Alto Gold Min. Co.*, 68 Pac. Rep. 498. For suit by manager for salary, see *Rocky Mountain Oil Co. v. Phillips*, 68 Pac. Rep. 269. "In an action by the commonwealth against a foreign corporation to recover the penalty imposed for engaging in business without filing the statement required by statute, it being shown that defendant has done business in the State, the burden is upon it to show that it had filed the statement required." *Commonwealth v. Read Phosphate Co.*, 67 S. W. 45 (Ky. 1902). "Plaintiff was incorporated for twenty years by a decree of the Chancery Court in 1872. Laws 1887 authorized the continuance of all corporations whose charters expired by limitation for five years from the limitation, and before the expiration of such time plaintiff further extended its existence by a compliance with Acts 1893, c. 146, authorizing corporations chartered by the chancery courts to continue their existence. *Held*, that there was no merit in the



and hold property, as far as it may be necessary to carry out the purposes for which it was organized.<sup>1</sup> The right to acquire and convey property and the power to contract, are privileges which are incidental to every such corporation,<sup>2</sup> and unless there is some statute to the contrary, property may be conveyed to a corporation by the same modes of conveyance, as those used in transfers to private individuals.<sup>3</sup> It is not necessary that a corporation should have special authority in its charter to enable it to convey its property,<sup>4</sup> and it can generally make any disposition of its effects, whether real or personal, in the usual course of its business, as would be necessary to further the objects for which it was created.<sup>5</sup> But a corporation must generally exercise its corporate powers after the manner in which

contention that plaintiff could not sue because its charter had expired." *Coal Creek M. & M. Co. v. Tenn. C. I. & R. Co.* (Tenn. 1901), 62 S. W. Rep. 162.

<sup>1</sup> *Whitman M. Co. v. Baker*, 3 Nev. 386; *Wright v. Oroville M. Co.*, 40 Cal. 20.

<sup>2</sup> *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 34; *Moss v. Averil*, 10 N. Y. 449. Corporation may purchase steamboat to ship coal by. *Calloway M. & M. Co. v. Clark*, 32 Mo. 305. And may run supply store. *Searright v. Payne*, 2 Tenn. Ch. 175.

<sup>3</sup> *Boone Cor.*, § 7; *Miners' D. Co. v. Zellerbach*, 37 Cal. 543.

<sup>4</sup> *Boone Cor.*, Sec. 7; *Wood Hy. H. M. Co. v. King*, 45 Ga. 34. The president and secretary of a corporation cannot authorize an agent to sell the property of the company without a resolution from the board of directors. *Johnson v. Sage*, 44 Pac. Rep. 641.

<sup>5</sup> *Horts v. Brown*, 77 Ill. 226; *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 34. A mining and smelting corporation has power to purchase smelting works with such appurtenances as are necessary to carry on the business and to assume and carry out contracts for the sale and transportation of their ore. *Moss v. Averill*, 10 N. Y. 449. As to estoppel of the corporation to deny validity of sale, see *Miners' D. Co. v. Zellerbach*, 37 Cal. 544. Sale to director held void in *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Md. 456. Neither the directors nor the stockholders of a mining corporation can dispose of all its property, while it is prosperous, against the will of any one of the shareholders. *Forrester v. Boston & C. Mining Co.*, 21 Mont. 544; 55 Pac. Rep. 229.

they are conferred by its charter, and while a corporation has the implied power to use such means as are necessary to carry out the authority expressly conferred by its charter, a mining corporation would not have the right to purchase property or make loans for purposes that were not necessary to further its mining operations, or the legitimate business for which it was created;<sup>1</sup> and although the State alone would have the right to object to such conveyance to a mining corporation, still, if the conveyance was not germane to the objects for which it was created, and if the corporation could not hold the property in its own name, it could not hold it in the name of a private individual, nor could it take a beneficial interest in the property.<sup>2</sup>

<sup>1</sup> *Cherokee Iron Co. v. Jones*, 52 Ga. 276. Where the purchase of a flour mill was held *ultra vires*. *Copper Miners of E. v. Fox*, 16 Q. B. 227. Nor can a corporation take stock in another mining company in exchange for land. *Watts' App.*, 78 Pa. St. 370.

<sup>2</sup> *Coleman v. L. R. T. R. Co.*, 49 Cal. 517; *Whitman M. Co. v. Baker*, 3 Nev. 386. "Conceding it to be unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment thereof the stock of the grantee to be distributed among its own stockholders, yet if such sale is made, and the contract fully executed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality." *Miners' D. Co. v. Zellerbach*, 37 Cal. 544; *M. M. D. 47*. "A State may require the consent of the stockholders of a foreign mining corporation as a necessary prerequisite to the sale or incumbrance of the mining ground owned by it within the State, as such a requirement is not a regulation of the internal affairs of the corporation, but has reference to the conduct by it of its business." *Williams v. Gaylord*, 180 U. S. 710. "Rhodes constructed a private railroad to his own mines through an alley on the line of an incorporated railroad company with their consent; he was enjoined from using it and ordered to remove the rails, etc. He procured the incorporation of himself and six others, as a railroad, coal and oil company, with a capital of \$100,000; they were authorized to buy any railroad partly or wholly completed, and damages were to be ascertained, etc., according to the general railroad law. The company was organized before any stock was taken, and Rhodes sold to them his railroads,

§ 310. *Same—Sale or purchase by agents.*—A conveyance of corporate property can only be made by agents of the corporation and the agency may be created and proved by parol evidence merely.<sup>1</sup> Where an agency is created a fiduciary relation also arises, requiring not only good faith by the agent but full disclosures and any concealment of known mineral deposits by the agent from the owner, or other fraudulent acts, will justify the setting aside of a sale or purchase of mineral property.<sup>2</sup> In the case of a purchase, through agents, the company is entitled to the best bargain the agent can drive, and the latter can make no secret profit;<sup>3</sup> in the sale of the company's property it is likewise entitled to the full purchase price realized, and the agent can be held to account for all profit paid by the purchaser without the consent of the seller.<sup>4</sup> But in such cases only the corporation can complain of the fraud practiced on it,<sup>5</sup> and even the company itself may be estopped by its conduct,<sup>6</sup> or barred by its

mines, etc., for \$100,000, payable in the stock of the company, which had no other assets than the property sold by Rhodes. The company relaid the road and operated it with locomotives, etc.: *Hell*, that Rhodes was the owner after the organization and his sale to them, as he had been before. 2. The road sold by Rhodes, having been built without authority of law, and being a nuisance, the act of incorporation did not authorize the company to purchase such road." *McCandless' Appeal*, 70 Pa. St. 210; M. M. D. 57.

<sup>1</sup> *Hardenberg v. Bacon*, 33 Cal. 356. A verbal power will authorize a bill of sale of claim. *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

<sup>2</sup> *Norris v. Taylor*, 49 Ill. 18.

<sup>3</sup> *Beck v. Kantorowicky*, 3 Kay. 230; *Page v. Carpenter*, 43 N. H. 363.

<sup>4</sup> *Henry v. Everts*, 29 Cal. 610; *Bates v. Sierra Nevada Co.*, 18 Cal. 171; *Cumberland Co. v. Sherman*, 30 Barb. 553. An increased price must be accounted for even after knowledge of principal of the price realized. *Bell v. Bell*, 3 W. Va. 183.

<sup>5</sup> *McAleer v. McMurray*, 58 Pa. St. 126.

<sup>6</sup> *Negley v. Lindsay*, 67 Pa. St., 217; *Atlas Min. Co. v. Johnson*, 23 Mich., 27.

laches,<sup>1</sup> or prevented because of its ratification,<sup>2</sup> from complaining of the acts it could otherwise claim the benefit of.

§ 311. **Corporate contracts.** — The power to make such contracts as may be necessary to carry out the purposes for which it was formed is incidental to the existence of every mining corporation.<sup>3</sup> It can make any contract within its powers, either in the State of its residence,<sup>4</sup> or in a foreign government,<sup>5</sup> if the same is not against the laws of the State where it is made, and as all corporations are presumed to contract within the powers of their charters, it lies upon the party alleging the invalidity of such a contract to show that it is void.<sup>6</sup> The contract can be made in any form,<sup>7</sup> unless the mode of contracting is prescribed, and the corporation could be held on an implied contract;<sup>8</sup> but where the mode of contracting is prescribed, the same must be followed by the corporation, and any other contract would be invalid.<sup>9</sup> When the con-

<sup>1</sup> *Campbell v. Fleming*, 1 Ad. & El. 40; *Gifford v. Corville*, 29 Cal. 589.

<sup>2</sup> *Negley v. Lindsay*, 67 Pa. St. 217; *Henry v. Everts*, 29 Cal. 610. But a second contract, if made under the influence of the agent who perpetrated the first fraud, is not a condonation or ratification. *Davis v. Henry*, 4 W. Va. 571.

<sup>3</sup> *Brooklyn Gravel Co. v. Slaughter*, 33 Ind. 185; *Galena v. Corwith*, 48 Ill. 423; *Boone*, § 48.

<sup>4</sup> *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Boone Cor.*, § 48 and cases cited.

<sup>5</sup> *Tombigbee Ry. Co. v. Kueeland*, 4 How. 16; *Weymouth v. Wash. &c. Ry. Co.*, 1 McArthur, 19.

<sup>6</sup> *Oxford Iron Co. v. Spreadley*, 46 Ala. 98; *Downing v. Mt. Wash. Co.*, 40 N. H. 230.

<sup>7</sup> *Gowan Marble Co. v. Tarrant*, 73 Ill. 608.

<sup>8</sup> *Lowe v. London &c. Co.*, 14 Eng. L. & Eq. 18.

<sup>9</sup> *Boone on Cor.*, § 44; *Zottman v. San Francisco*, 20 Cal. 390; *Pimenton v. Same*, 21 Id. 351.

tract has once been made, if entered into in the legitimate course of the corporation's business, the corporation would be bound thereby, unless the same is opposed to the organic law of the land;<sup>1</sup> and even if the contract was made by an agent without authority from the corporation to make it, the corporation may still be rendered liable on the contract if the same is subsequently ratified by the company;<sup>2</sup> but the subsequent ratification, in order to charge a corporation on such a contract must have been complete,<sup>3</sup> and it must be shown, in order to bind the corporation by a subsequent ratification, that the acts relied on as constituting a ratification, were performed with a full knowledge of all material facts.<sup>4</sup>

§ 312. **Corporate deeds.** — When a corporation is empowered by its charter to buy and sell real estate, it has full authority to execute a deed conveying such real estate as the corporation may have acquired;<sup>5</sup> but the deed to be valid must be executed in the name of the corporation and under the corporate seal.<sup>6</sup> Where the mode of conveyance is prescribed by the charter, that mode alone must be

<sup>1</sup> Boone on Cor, § 76; *Stross v. Eagle Ins. Co.*, 5 Ohio St. 59; *Hurd v. Green*, 17 Hun, 327.

<sup>2</sup> *Phosphate of Lime Co. v. Green*, Law. R., 7 Comp. 43; *Alexander v. Swift*, 31 Cal. 26; *Perry v. Simpson & Co.*, 37 Conn. 520; *Ormsby v. Copper Min. Co.*, 56 N. Y. 623; *Shover v. B. R. Min. Co.*, 10 Cal. 396.

<sup>3</sup> *Whitwell v. Wormer*, 20 Vt. 425; Boone on Cor., § 76 and cases cited.

<sup>4</sup> *Penna. Nav. Co. v. Danbridge*, 8 Gill. & J. 248; *Cumberland Coal & Co. v. Sherman*, 20 Md. 117; *State Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Blen v. Bear River & Co. Min. Co.*, 20 Cal. 602; *Kent v. Quicksilver Min. Co.*, 12 Hun, 53; *Hoyt v. Same*, 17 *Id.* 169. For case where course of business was held to bind corporation, by unauthorized contract of agent, see *Salem Iron Co. v. Lake Sup. Co.*, 112 Fed. Rep. 239.

<sup>5</sup> But a deed made either by the president (*Crump v. M. S. M. Co.*, 7 Gratt. 352) or the directors, without authority, is void. *Gashwiler v. Willis*, 33 Cal. 11.

<sup>6</sup> But see *S. I. Co. v. Waddell*, L. R. 3 C. P. 463.

followed in executing a deed of the corporate property, and where no mode of conveyance is prescribed by the charter, the deed must be made in the corporate name; and a deed executed in the name of an officer of the corporation and under his seal will be invalid,<sup>1</sup> although an agent may execute valid deeds of corporate property when authorized to do so by the stockholders of the corporation; and even though he was not authorized by the stockholders to execute such a deed, if the deed was executed through mistake and was meant to be a deed of the corporation, it would probably be reformed by a court of equity,<sup>2</sup> but a general agent of the corporation has no authority, as such, to transfer by deed, the real estate of the corporation.<sup>3</sup>

<sup>1</sup> *Carey v. Philadelphia Pet. Co.*, 33 Cal. 694; *Pekin M. Co. v. Kennedy*, 81 Cal. 356.

<sup>2</sup> *Boone on Cor.*, Sec. 54.

<sup>3</sup> *Ante, idem.* "The individuals who are the trustees of a corporation, in their official character as trustees, when not acting as a board have no authority independent of that conferred by the corporation, to execute a deed of the corporate property." *Gashwiler v. Willis*, 33 Cal. 11; M. M. D. 55. "Where a corporation is engaged in the business of conveying water through ditches for sale to miners, a purchase of additional ditch property, with a view of extending the operations of the company, is not a matter within the ordinary course of business of such corporation, and its president, as such, has no authority to bind the corporation by a contract for such purchase." *Blen v. Bear River & A. W. & M. Co.*, 20 Cal. 602; M. M. D. 50. "Where a corporation, incorporated for the purpose of manufacturing iron in all its branches, in pursuance of a resolution of its stockholders, made a lease of its iron works and all its property to its president, who owned the majority of its stock, for a period of two years and a half, and the business of the corporation was carried on by the lessee in the same manner as before the lease was given, without notice to persons dealing with it of any change, until the failure of the lessee and his assignment of the property for the benefit of creditors: *Held*, that the lease was void for two reasons: 1. Because it was the act of the stockholders and not of its directors, by whom alone the corporation could act; 2. Because the effect of such lease was to suspend the ordinary business of the corpo-

§ 313. **Corporate officers and agents.** — A corporation can generally only act through its agents or officers who are appointed or elected by authority of the stockholders to transact the business of the corporation.<sup>1</sup> The agents of a corporation stand generally upon the same footing as the agents of a private individual and except as regards the power of the agent to bind the corporation to contracts made by an agent of the corporation, which the corporation itself, under its charter, would not have had the power to make,<sup>2</sup> the agent, when acting within the general scope of his authority, can bind his principal the same as though he were the agent of a natural person.<sup>3</sup> And while a corporation is not, generally, liable for the acts of an agent, committed beyond the general scope of his authority,<sup>4</sup> if the corporation should subsequently ratify the unauthorized act of its agent, or if the agent, though acting under his general authority, should use his powers for an unauthorized purpose, dealing with some innocent person, the corporation would be liable for the acts of its agent, to the same extent as though it had given him authority to act in the first instance.<sup>5</sup> The officers and directors of a corporation occupy the relation of trus-

ration for the period of more than one year, and thus amounted to a surrender of its rights, privileges and franchises, within 2 R. S. 463." *Conro v. Port Henry Iron Co.*, 12 Barb. 27; M. M. D. 50.

<sup>1</sup> *Union M. Co. v. Bank*, 2 Colo. 565; *Wright v. Oroville M. Co.*, 40 Cal. 20; *Hillyer v. Overman Sil. Min. Co.*, 6 Nev. 61.

<sup>2</sup> *Blen v. Bear River &c. M. Co.*, 20 Cal. 602; *Crump v. U. S. M. Co.*, 7 Gratt. (Va.) 352.

<sup>3</sup> *Wood Hy. H. M. Co. v. King*, 45 Ga. 34; *Moss v. McCulloh*, 7 Barb. 279.

<sup>4</sup> *Cher. Iron Co. v. Jones*, 52 Ga. 276; *Copper M. of E. v. Fox*, 16 Q. B. 227.

<sup>5</sup> *Union M. Co. v. Bank*, 2 Colo. 248, 565. But see, *contra*, *McCulloh v. Moss*, 5 Denio, 566.

tees to the shareholders of the corporation, and by reason of their fiduciary relation are prevented from acquiring interests in their official capacity that would result injuriously to the interests of the stockholders of the corporation.<sup>1</sup> So it has been held that a director or other officer of a mining corporation cannot accept and carry out a contract for the corporation or acquire any pecuniary interest from a contract between the corporation and a third person.<sup>2</sup> But it is not deemed inconsistent with the fiduciary relation which the officers of a corporation bear to the stockholders of such corporation, for the officer, in his private capacity, to make a loan to the corporation, for in such a case the corporation receives the benefit of the loan and if the loan is made in good faith and the transaction is open, the officer making the loan could afterwards sue for and recover the amount loaned the corporation.<sup>3</sup>

<sup>1</sup> *Stern Coal Co. v. Cumberland Coal &c. Co.*, 16 Md. 456; *Wright v. Oroville M. Co.*, 40 Cal. 20.

<sup>2</sup> *Cumberland Coal Co. v. Sherman*, 80 Barb. 558; *Rice's App.*, Ahl's App., 79 Pa. St. 168; *Watts' App.*, 78 Pa. St. 370; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 203; *Sherman v. Clark*, 4 Nev. 140; *Robinson v. Smith*, 2 Paige Ch. 222; *Conro v. P. H. Iron Co.*, 12 Barb. 27; 16 Md. 456.

<sup>3</sup> *Twin Lick Oil Co. v. Nurburg*, 1 Otto (91 U. S.), 587; *Merrick v. Penn. Coal Co.*, 68 Ill. 472. But directors of a corporation being trustees of its property (*Gashwiler v. Willis*, 83 Cal. 11), their acts will be closely scrutinized by the courts when they are benefited personally as a result of their dealings, and the transaction must be free from all fraud or oppression. *Horts v. Brown*, 77 Ill. 226. "Where the directors of a mining company employed the funds of the company in the purchase and sale of various stocks: *Held*, a palpable violation of duty which rendered them personally liable to make good the loss." *Robinson v. Smith*, 2 Paige Ch. 222; M. M. D. 26. "A director in a corporation at the time a sale of part of its property was contemplated and made, and who actively participated in all the measures tending to its completion, and had full knowledge of all the circumstances attending its progress, is not competent to become a purchaser of such property, and the sale to him cannot be upheld if resisted by the corporation." *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Md. 456; M.



§ 314. Same — Promoters distinguished from agents.— Before a mining corporation is formed the allottees of shares in such a company are not, as such, liable for the acts of the managers.<sup>1</sup> Associations for forming companies, whether in a partnership or corporation, are not liable for the obligations of the association, as such, until the same has an existence, and in order to hold a person engaged with others in forming such a company, liable for the acts of his associates, he must have instructed them to perform such acts as his agent, or subsequently have ratified such acts.<sup>2</sup> Unless the person contracting the obligation has been definitely constituted the agent of the different members, the members cannot be held for the acts of the promoters of the company.<sup>3</sup> It is incumbent on those who assert that such a liability exists, to prove to the satisfaction of the court or jury, the existence of an authority emanating

M. D. 56. "Are not permitted to make profit out of it in buying lands or dealing with it." *Rice's Appeal*; *Ahl's Appeal*, 79 Pa. St. 168; M. D. 56. "A fraud against a corporation by any or all of the directors may be redressed by an action in the name of the corporation." *Id.*; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202. "Directors and managers of corporations and other companies, are within the rule which governs the dealings of trustee and *cestui que trust*, and agent and principal; such directors and managers are in fact trustees and agents of the bodies represented by them." *Cumberland C. & I. Co. v. Parish*, 42 Md. 598; M. M. D. 50.

<sup>1</sup> *Alger on Pro. of Cor.*, Secs. 18, 19.

<sup>2</sup> *Merrick v. Peru C. Co.*, 61 Ill. 472; *Peru C. Co. v. Merrick*, 79 Ill. 112.

<sup>3</sup> *Paxton v. Bacon Min. Co.*, 2 Nev. 257. In *Ladywell Mining Co. v. Brooks* (85 Ch. D. 400), five persons bought a mine for 5,000 pounds, with a view to sell it to a company to be formed. They paid for it themselves and two months later sold it to the corporation for 18,000 pounds, without disclosing the purchase price. On a suit for an accounting for the profit made it was held the corporation could not recover the profit, as they were not promoters when the purchase was made. See also *Alger on Pro. of Cor.*, pp. 18 and 19.

from the member in question, and conferred upon the others to bind them by such acts.<sup>1</sup> But it is not essential to hold individual members liable that a special authority for each separate act should be shown to have been conferred upon the agent, and a general authority such as that conferred by one member of a committee upon his co-committeemen, which would be sufficient to make their acts his own, would be all that is necessary to constitute such an agency,<sup>2</sup> and it has been held that such authority could be properly inferred from public announcements, prospectuses and advertisements;<sup>3</sup> but no such general authority could be assumed, from the mere announcement that the party sought to be charged was acting conjointly with others and endeavoring to form a company.<sup>4</sup>

§ 315. **Corporate liability for promoters' contracts.** — Promoters and parties who deal with a corporation, as such, are estopped to deny its corporate existence;<sup>5</sup> but the corporation, as such, is not estopped to deny the authority of its promoters to bind it by their acts, and the weight of authority seems to be that before it can be held on such contracts it must obligate itself to pay therefor after commencement of its corporate life,<sup>6</sup> or accept bene-

<sup>1</sup> Before the existence of the corporate body it can have no agents, and the persons promoting it but represent themselves. *Alger on Pro. of Cor.*, Sec. 194, p. 199; *Carey v. Des Moines Coal & Min. Co.*, 81 Iowa, 674.

<sup>2</sup> *Alger on Pro. of Cor.*, Secs. 261-265.

<sup>3</sup> *Ante, idem*, Secs. 235, 236.

<sup>4</sup> *Dole v. Wooldredge*, 135 Mass. 140; *Alger Pro. Cor.*, p. 240, Sec. 235.

<sup>5</sup> *Tuckoseegee Min. Co. v. Goodhue*, 118 N. C. 98; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307.

<sup>6</sup> *Queen City Co. v. Crawford*, 127 Mo. 356; *Weatherford & Co. v. Grouger*, 86 Tex. 350; *Alger Pro. of Cor.*, Sec. 199, p. 202.

fits in such a way that it would be inequitable for it to repudiate the contract.<sup>1</sup> As in the interpretation of other contracts, the question is one of intention as to who was intended to be made liable on the contract.<sup>2</sup> If the contract is executed for and in the name of the corporation to be formed, there is, ordinarily, no liability personally on the promoter;<sup>3</sup> if the contract is oral, the question of who was intended to be charged is a fact, to be tried as any other,<sup>4</sup> but if it is in writing it would be a question of law, for the court, to say who was liable thereunder.<sup>5</sup> But it is not, in every case, essential to the corporate liability that a new contract should be shown on the part of the corporation, after it comes into being, for if it knowingly accepts the result of one's services or property not paid for, and receives the benefit therefrom, under circumstances that would be inequitable for the party seeking an enforcement of his rights to first establish a contract on the part of the corporation to pay for such services or property, the law would imply a promise to pay therefor, or, what is the same thing, impose a liability for the corresponding benefit received,<sup>6</sup> and such a ratification as would render the corporation liable could either be express or implied,<sup>7</sup> and

<sup>1</sup> *In re Daly & Plant Co.*, 61 L. T. Rep. 206; *Alger*, p. 203.

<sup>2</sup> *Whitney v. Wyman*, 101 U. S. 392; *Alger*, p. 229.

<sup>3</sup> *Alger Pro. Cor.*, p. 229 and cases.

<sup>4</sup> *Landman v. Entwistle*, 7 Ex. 632, a leading case; *Alger Pro. of Cor.*, p. 230.

<sup>5</sup> If the written contract makes him liable, no evidence can shift the promoter's liability, and if it is the contract of the corporation he is not liable. *Higgins v. Senior*, 8 M. & W. 834; *Whitney v. Wyman*, 101 U. S. 392; *Hurst v. Salisbury*, 55 Mo. 310; *Hall v. Crandall*, 29 Cal. 567.

<sup>6</sup> *In re Hereford Co.*, 2 Ch D. 611; *In re Empress & Co.*, 16 Ch D. 125; *Alger Pro. of Cor.*, p. 203.

<sup>7</sup> Working a mine after knowledge of the facts constitutes an affirmation of the promoter's contracts. *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218.

in either event would be irrevocable, if intelligently made.<sup>1</sup>

§ 316. **Liability of directors who exceed authority.** — A person who deals with directors whom he knows to be exceeding their authority cannot afterwards complain if their acts are subsequently repudiated by the corporation.<sup>2</sup> The authority of the directors can be readily ascertained, and those dealing with them are supposed to know the limits of their power. The directors are not personally liable for honest mistakes as to the legal extent of their authority.<sup>3</sup> The person dealing with the directors should investigate the limits of their authority, and if he fails to do so he deliberately runs the risk of having his acts repudiated, and in the absence of fraud on their part, the directors cannot be held personally for the consequences of their acts.<sup>4</sup> But if the directors, instead of contracting in a representative capacity, on behalf of the company, enter into a contract as principals, they will be personally bound for the obligation assumed, unless the contract is not a legal and binding obligation.<sup>5</sup> The fact that the corporation would not be bound by the contract does not, *per se*, render it void as against the directors personally, and where, from the nature

<sup>1</sup> *Kennedy v. Thorp*, 51 N. Y. 174; *Tarkinson v. Purvis*, 128 Ind. 182; *Farlow v. Ellis*, 15 Gray, 229; *Alger on Pro. Cor.*, Sec. 100, p. 108. And laches alone will bar the corporation from repudiating the contract. *In re Pinto Silver Min. Co.*, 8 Ch. D. 273.

<sup>2</sup> *Miners G. M. Co. v. Bank*, 1 Colo. 538; *Lindley on Part.*, Sec. 367, and cases cited.

<sup>3</sup> *Cumberland C. & I. Co. v. Parish*, 42 Md. 598; *Horts v. Brown*, 77 Ill. 226.

<sup>4</sup> *Cumberland Co. v. Sherman*, 30 Barb. (N. Y.) 558; *Wood Hydraulic Co. v. King*, 45 Ga. 84; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

<sup>5</sup> *Moas v. Livingston*, 4 N. Y. 208; *Scott v. Baker*, 3 W. Va. 285; *Rand v. Hale*, 8 W. Va. 495.

and form of the contract, a personal liability can be attached to the directors, their liability is not affected by the fact that they would have had no power to make such a contract on the part of the company.<sup>1</sup> So, directors, like other agents, impliedly warrant all the facts necessary to confer the authority which they profess to exercise, and where the authority which they profess to possess, has been revoked or expired, they are personally liable on the ground of fraud.<sup>2</sup> If the power of the corporation which they represent to borrow money has expired, and the directors proceed nevertheless to raise money on the strength of the power which the corporation formerly possessed, they can be held personally for the amount so obtained and this irrespective of any representations on their part.<sup>3</sup>

§ 317. *Same — Limitation on their agency.* — Some of the authorities have held that an act which ought to be done by a board of directors, would be invalid, although it was done by the requisite number, if the business was not transacted at a meeting of the board.<sup>4</sup> This proposition is undoubtedly correct as between the company and any person having notice of the irregularity;<sup>5</sup> but as be-

<sup>1</sup> *Ante, idem.* But an intention to bind the company only can either be shown by the contract itself (*Shaver v. Ocean M. Co.*, 20 Cal. 45), or by oral evidence. *Shafer v. Bidwell*, 9 Nev. 209; *Gerber v. Stuart*, 1 Mont. 172.

<sup>2</sup> *Rolinson v. Smith*, 2 Paige Ch. 222; *Lindley*, Sec. 367; *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Neb. 456.

<sup>3</sup> *Weiss v. Manch Chunk I. Co.*, 58 Pa. St. 295; *Atwood v. Small*, 1 Man. & Ry. 246; *Hancock v. Hodgson*, 4 Bing. 269.

<sup>4</sup> The delegation of authority is to the trustees as such. *Hillyer v. Overman Silver Mining Co.*, 6 Nev. 51. The individuals composing the board could not make a valid deed when not acting as a board. *Gashwiler v. Willis*, 33 Cal. 11.

<sup>5</sup> *Conro v. Iron Co.*, 12 Barb. 27.

tween the company and persons having no notice of the irregularity, the weight of authorities is in favor of holding the company bound by such a transaction.<sup>1</sup> Where the given number of directors authorized to transact the company's business do not exist, the company cannot properly transact its business,<sup>2</sup> but if it does transact business through its shareholders, the same as though the regularly constituted board of directors did exist, the company cannot itself take advantage of this fact, but would be bound by the acts of such persons in all ordinary business transactions, in favor of all persons dealing with them in good faith, without notice of their defective appointment.<sup>3</sup> But where the business transacted is beyond the ordinary course of the corporate business, and those present were only sufficient to constitute a *quorum*, for the dispatch of ordinary business, the company will not, in such case, be bound by the acts of the board of directors.<sup>4</sup> The directors of a corporation are, of course, the legal agents of the company, and all the members of the corporation, including the directors, are, as such, liable for the authorized acts of the directors;<sup>5</sup> but one who is a director is no more liable for the acts of his codirectors, than any other shareholder, unless he has done something to make his codirectors his

<sup>1</sup> *Wright v. Min. Co.*, 40 Cal. 20; *Wood H. M. Co. v. King*, 45 Ga. 34.

<sup>2</sup> *State v. Curtis*, 9 Nev. 325.

<sup>3</sup> As to unauthorized acts, which it ratifies, a corporation is bound the same as an individual. *Wood H. M. Co. v. King*, 45 Ga. 34.

<sup>4</sup> A company organized to trade in copper only cannot be held by a contract for iron. *Copper Miners of E. v. Fox*, 16 Q. B. 227. And a contract to take corporate stock for real estate is *ultra vires*. *Watts' App.*, 78 Pa. St. 432. But a mining and smelting corporation can not only buy and sell smelting works, but provide means of transporting its product. *Moss v. Averill*, 18 N. Y. 449.

<sup>5</sup> *Gordon v. Swan*, 48 Cal. 564. And the same rule applies as to acts done within the scope of the agent's authority, whether the liability sounds in tort or contract. *Kielly v. Belcher Co.*, 8 Saw. 437.

agents in some other sense than this;<sup>1</sup> for in this respect directors are like promoters of a company, each being responsible for his own acts, and for the acts of the others, so far as he has made them his agents.<sup>2</sup>

§ 318. **Same — Acts ultra vires.**— Mining corporations, like other similar corporations, are controlled by and limited to the authority conferred by their charter. They exist alone for the purposes for which they were originally created, and for no other purposes. The instrument by which they were created defines what these purposes are, and the capacity of the corporation is limited accordingly. Therefore, all contracts on the part of the corporation, foreign to the purposes for which it was created, are wholly void and of no effect.<sup>3</sup> The powers of the directors are the same as other shareholders, when it comes to entering into contracts not warranted by the constitution or charter,<sup>4</sup> and such contracts are necessarily illegal, even though made with the assent of the members.<sup>5</sup> The directors have full authority to transact the company's business, or to enter into undertakings germane

<sup>1</sup> Lindley on Part., Sec. 246; *Robinson v. Smith*, 2 Paige Ch. 222. A fraud by any or all of the directors may be redressed in an action by the corporation. *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202.

<sup>2</sup> Lindley on Part., *supra*. Whether or not the agency exists is a question of fact. *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 505. "The board of trustees of a corporation may control the corporate property within the limit that the law has assigned to the exercise of corporate authority." *Wright v. Oroville M. Co.*, 40 Cal. 20; M. M. D. 56. "A director of a corporation is an agent or trustee for the stockholders, and as such is held to the obligations of fiduciary relations." *Cumberland Co. v. Sherman*, 80 Barb. (N. Y.) 538; M. M. D. 50.

<sup>3</sup> *Watts' App.*, 78 Pa. St. 370; *Copper Miners of E. v. Fox*, 16 Q. B. 227; *Cherokee Iron Co. v. Jones*, 52 Ga. 276; *Smith v. Richardson*, 77 Mo. App. 422.

<sup>4</sup> *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202.

<sup>5</sup> *McCullough v. Moss*, 5 Denio, 566.

to the purposes for which the same was formed,<sup>1</sup> but they have no power to engage in a class of business for the transaction of which the company was not formed, and where such contracts are entered into, the corporation cannot be estopped by deed or otherwise, from showing that it had no power to do that which it purports to have done.<sup>2</sup> Where the limitations of the directors' authority to bind the company is made public, or the purposes for which the corporation was formed can easily be obtained, the public dealing with the corporation is bound to notice its regulations and the extent of the directors' powers, and those dealing with the company assume the risk of entering into contracts which the corporation had no power to make.<sup>3</sup> But this doctrine is based upon the necessity of protecting the shareholders from liability resulting from unauthorized acts of directors, and although one dealing with the directors with full knowledge of the limitations of their authority would have no recourse, either against the corporation, or the directors; where one who is ignorant of the limitations on the power of the directors enters into a contract with them in good faith, they can be held personally liable in respect to such a contract, if it afterwards develops that in entering into the contract they assumed powers which they did not, in fact, possess.<sup>4</sup>

§ 319. Same—Irregular acts *intra vires*. — Whether the directors are to be regarded as the special agents of

<sup>1</sup> Wood Hy. H. M. Co. v. King, 45 Ga. 84.

<sup>2</sup> McCullough v. Moss, *supra*.

<sup>3</sup> Watts' App., 78 Pa. St. 423.

<sup>4</sup> Lindley Part., Secs. 250 and 252 and cases cited; Beach Priv. Cor., Secs. 421, 434. The burden is on the party alleging *ultra vires*. Allen v. West Point Mining Co. (Ala. 1902), 31 South. Rep. 462.



the corporation for certain purposes, or whether they are to be considered the general agents of the company, for the purpose of transacting its business, is a question upon which the authorities have differed widely, but the tendency of the courts is to hold the directors to be special, rather than general, agents of the corporation.<sup>1</sup> However this may be, it is well settled that the company is bound by the acts of the directors, which are within the general scope of their authority, whether they acted in the manner prescribed by the regulations of the company or not.<sup>2</sup> In this particular there is a practical distinction between acts which are entirely beyond the power of the directors to perform, and those which they can perform conditionally, provided certain requisites which have been prescribed by the by-laws or charter of the corporation are complied with. The first are commonly called acts *ultra vires*, and the second, although *intra vires*, are irregular. With the exception of their liability on commercial paper which has passed into the hands of *bona fide* holders, corporations are not generally liable for the acts of their directors, which are altogether beyond the scope of their authority;<sup>3</sup> but they would be liable to persons who deal with the directors, in good faith, for acts which the directors had power to perform, provided they had complied with certain conditions, although they should fail to comply with the conditions prescribed for the performance of those acts, if

<sup>1</sup> They are the trustees for the stockholders and corporate creditors. *Simons v. Oil Co.*, 61 Pa. St. 202. They can but act *for* and not against the interests of the company. *Id.*

<sup>2</sup> *Union M. Co. v. Bank*, 2 Colo. 248. Unless restrained, the directors can exercise the ordinary powers of the corporation. *Wood Co. v. King*, 45 Ga. 84.

<sup>3</sup> *Tiedeman on Com. Paper*, Sec. 116 and cases cited; *Beach Priv. Cor.*, Secs. 421, 434.

the persons dealing with the corporation had no notice of the irregularities of which the directors had been guilty.<sup>1</sup>

§ 320. **Authority of the president.** — The president of a mining corporation has no authority by virtue of his position, merely, to make contracts binding the corporation, except as to matters in the ordinary course of the corporate business.<sup>2</sup> As a general rule the corporation could not be held upon any unauthorized contracts of the president to buy<sup>3</sup> or sell<sup>4</sup> property; he could not acquire either by assignment<sup>5</sup> or lease,<sup>6</sup> the entire property of the corporation to the injury of its creditors, but the corporation and its assets in his hands would remain liable for its debts; nor would it, generally, be liable for commercial paper issued by him, unless for legitimate business of the company.<sup>7</sup> But as the chief officer and agent of the company the president can convene and supervise, generally, the business of the managing board;<sup>8</sup> can assume general control of the corporation affairs, handle its property, pay its debts and manage its business, and generally bind the corporation, so long as he acts the part of a faithful officer,

<sup>1</sup> Lindley on Part, Sec. 250 and citations; Tiedeman Com. Paper, Sec. 116; Beach Priv. Cor., *supra*.

<sup>2</sup> *Blen v. Bear River & A. W. & M. Co.*, 20 Cal. 602. He cannot bind the corporation by the ratification of an unauthorized contract of its superintendent. *Union M. Co. v. Bank*, 2 Colo. 248.

<sup>3</sup> *Blen v. Bear River & c. Co.*, *supra*.

<sup>4</sup> *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352. Unless appointed its agent to sell, his representations are not binding upon the company. *Crump v. U. S. M. Co.*, 7 Gratt. (Va.) 352; *Barnard Bank v. Tessler*, 89 Mo. App. 217.

<sup>5</sup> *Conro v. Port Henry Iron Co.*, 12 Barb. 27.

<sup>6</sup> *Ante, idem*.

<sup>7</sup> *Moss v. Livingston*, 4 N. J. 208; *Rand v. Hale*, 8 W. Va. 495.

<sup>8</sup> *Union G. M. Co. v. Bank*, 1 Colo. 532.

within the line of the company's business;<sup>1</sup> render it liable for debts contracted in the course of its business,<sup>2</sup> and on commercial paper for legitimate corporate debts or money borrowed by the corporation.<sup>3</sup> On account of his trust relation, however, the president is held to the utmost good faith; can derive no secret advantage of the corporation;<sup>4</sup> must make full disclosures,<sup>5</sup> and unless provision is made in the by-laws, he cannot recover for his services.<sup>6</sup>

§ 321. **Rights and powers of mine superintendent.** — The rights and powers of a mine superintendent, like any other agent of a corporation, are limited to those conferred on him by the corporation and such implied powers as are necessary to enable him to enforce those expressly given him by the company.<sup>7</sup> He does not acquire any implied powers by virtue of his office, and unless the corporation has given him the express authority to contract debts, he will not have any right, by virtue of his position merely, to borrow money on the credit of the corporation.<sup>8</sup> If a mine superintendent borrow money without any express authority given him by the corporation, the president of the company, as such, has not the power to ratify the contract of the agent, and to undertake, in the name of the corporation, for the repayment of the unauthorized loan,

<sup>1</sup> *Ante, idem.*

<sup>2</sup> *Savage v. Ball*, 17 N. J. Ch. 143.

<sup>3</sup> *Moss v. Oakley*, 2 Hill, 265; *McCulloh v. Moss*, 5 Den. 567; *Magee v. Maklumne Min. Co.*, 5 Cal. 258.

<sup>4</sup> *Cumberland &c. Co. v. Parish*, 43 Md. 598.

<sup>5</sup> *Conro v. Port Henry Iron Co.*, 12 Barb. 27.

<sup>6</sup> *Merrick v. Peru Coal Co.*, 61 Ill. 473.

<sup>7</sup> *Atty.-Gen. v. Jackson*, 5 Hare. 355; *Carpenter v. Biggs*, 46 Cal. 91.

<sup>8</sup> *Moss v. Ashley*, 2 Hill, 265; *McCulloh v. Moss*, 5 Denio, 566. To relieve himself of personal liability superintendent may show paper was executed for company and that the payee so understood. *Schafer v. Bidwell*, 9 Nev. 209; *Gerber v. Stuart*, 1 Mont. 172.

for such authority could only be conferred or exercised by the stockholders or directors of the corporation.<sup>1</sup> The same rules apply in regard to written instruments and commercial paper, executed by the superintendent of a mining company, and in the absence of express authority given by the corporation, he will not have any power to change the terms of a written instrument,<sup>2</sup> or to bind the corporation by any species of commercial paper.<sup>3</sup> His commercial paper made without authority from the corporation, unless he derives his power from the established custom of the company, or the recognized usage of his predecessors, is absolutely void in law,<sup>4</sup> and the assignment of such paper does not operate as an assignment of the indebtedness for which it is given, even though the paper was given in payment for articles necessary for the use of the mining operations.<sup>5</sup>

§ 322. **Company bound by what acts of superintendent.** — The superintendent or manager of a mining company has full authority to bind the company, as to those with whom he is dealing, for all acts within the real or apparent scope of his authority, and this applies as well to contracts with employees to work in and about the mine, as to contracts for materials necessary for carrying on the mining operations, and the company would ordinarily be bound by all such contracts entered into by its superintendent.<sup>6</sup> But the superintendent has no implied power to borrow money

<sup>1</sup> *Union G. M. Co. v. Rocky Moun. Nat. Bank*, 2 Colo. 565; 248.

<sup>2</sup> *Lankey v. Succor M. & M. Co.*, 10 Nev. 17.

<sup>3</sup> *Carpenter v. Biggs*, 46 Cal. 91; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

<sup>4</sup> *Tiedeman on Com. Paper*, Sec. 248.

<sup>5</sup> *Skillman v. Lackman*, 23 Cal. 198; *Gillig v. Lake Brigler & Co.*, 2 Nev. 214.

<sup>6</sup> *Adams Min. Co. v. Senter*, 26 Mich. 23; *Jones v. Clark*, 42 Cal. 180; *B. & W. L. C. 525 et seq.*

on the credit of the company<sup>1</sup> or to issue commercial paper to bind the company, and a note issued by the superintendent of the company, even though given for things necessary for the use of the mine, would be absolutely void,<sup>2</sup> and its assignment would not operate as an assignment of the debt.<sup>3</sup>

§ 323. Same — Power to bind company on commercial paper. — While the superintendent's authority is limited to the peculiar duties he is employed to transact for the company, it is generally liable for all authorized acts of the superintendent, within the scope of his employment, or those ratified by the company and for its benefit.<sup>4</sup> But as to commercial paper executed by a superintendent or other agent for a mining corporation, the same rule applies that obtains in the case of other non-trading companies, and in the absence of some authority or adoption of the obligation as that of the corporation it could not be enforced against it.<sup>5</sup> The English rule as to cost-book mining companies was that no agent or member of the company could, *prima facie*, bind the company either by borrowing money,<sup>6</sup> or executing commercial

<sup>1</sup> Union Gold Min. Co. v. Rocky Moun. Nat. Bank, 2 Col. 565.

<sup>2</sup> Skillman v. Lackman, 28 Cal. 198; Gillig v. Lake Bigler Ry. Co., 2 Nev. 214.

<sup>3</sup> Carpenter v. Biggs, 46 Cal. 91. Nor would he have any power to alter a contract made by directors. Lankey v. Succor M. & M. Co., 10 Nev. 17. The general manager of a corporation has no implied power to create or grant a license to mine. Butte &c. Min. Co. v. Mont. Purch. Co., 21 Mont. 539; 55 Pac. Rep. 112.

<sup>4</sup> Herbert v. King, 1 Mont. 475; McCulloh v. Moss, 5 Denio, 566.

<sup>5</sup> McCulloh v. Moss, 5 Denio, 566; Blen v. Bear River &c. Min. Co., 20 Cal. 602; Union Min. Co. v. Rocky Mt. Bank, 2 Colo. 248; Hillyer v. Overman S. M. Co., 6 Nev. 51; Schaefer v. Bidwell, 9 Neb. 209.

<sup>6</sup> Ricketts v. Bennett, 4 C. B. 686; Howtayne v. Bourne, 7 M. & W. 595; German v. Mining Company, 4 DeG., M. & G. 40; MacSwiney, p. 461.

paper,<sup>1</sup> as these acts were not germane to the objects of the company; in all such cases the obligation was held to be the personal contract only of the agent.<sup>2</sup> This is, substantially, the same rule, on principle, that obtains as to the commercial paper of mining corporations not authorized, or for the corporate business, and in such cases there is held to be no liability on the part of the corporation.<sup>3</sup> But notwithstanding this general rule, the corporation may, either by its course of dealing, or by custom or express authority or ratification of the act of its agent in issuing commercial paper, render it liable therefor, and as to paper executed for the purposes of the corporation, the courts would enforce it the same as other corporate contracts.<sup>4</sup>

§ 324. **Liability for torts of agents.** — A corporation, the same as a natural person, is liable for the torts of its agents, which occur within the general scope of their employment, and this, generally, whether the acts result from the negligent, malicious or fraudulent conduct of its agents.<sup>5</sup> The corporation would be liable for such acts of its agents if they were committed either by the express or

<sup>1</sup> *Brown v. Byers*, 16 M. & W. 252; *Dickinson v. Valpy*, 10 B. & C. 128; *MacSwinney*, p. 461.

<sup>2</sup> *Nichols v. Diamond*, 9 Exch. 154; *Dickinson v. Valpy*, 10 B. & C. 128; *More v. Charles*, 5 E. & B. 978.

<sup>3</sup> *McCulloh v. Moss*, 5 Denio, 566; *Union M. Co. v. Bank*, 2 Colo. 248.

<sup>4</sup> *Savage v. Bell*, 17 N. J. Ch. 143; *Moss v. Oakley*, 2 Hill, 265; *McCulloh v. Moss*, 5 Denio, 566; *Gerber v. Stuart*, 1 Mont. 172; *Shover v. Ocean Mining Co.*, 20 Cal. 45; *Schaefer v. Bidwell*, 9 Nev. 209. A corporation that has permitted its agent to buy supplies is liable therefor if the seller had notice of such custom. *Van Dusen v. Star Q. M. Co.*, 36 Cal. 571.

<sup>5</sup> See chapter, *Trespass*. *Kielly v. Belcher S. M. Co.*, 3 Saw. 437. As to wrongfully cutting timber, see *Yahoola River M. Co. v. Irby*, 40 Ga. 479.

implied authority of the corporation;<sup>1</sup> and where the agent was acting under the general powers conferred on him by the corporation and within the scope of his employment, the corporation would be liable, even though the tortious acts of the agent were not previously authorized, either by express or implied authority, or subsequently ratified by the corporation;<sup>2</sup> and the mistake of the agent in executing the authority conferred by the corporation, if such authority was conferred, could be set up as a defense to relieve the corporation from the liability resulting from the agent's wrongful or tortious conduct.<sup>3</sup> The same rule of damages governs, in respect to injuries from the torts of agents of corporations, that would obtain in the case of natural persons, and it is an acknowledged proposition that corporations may be subjected to exemplary or punitive damages for the tortious acts of their agents, done within the general scope of their authority.<sup>4</sup> But where punitive damages are allowable against corporations the conditions and circumstances of the defendant are material considerations.<sup>5</sup>

§ 325. Same — Miscellaneous cases. — The cases are numerous in which the rule laid down in the above para-

<sup>1</sup> *Ante, idem.* "A corporation carrying on the business of mining, is liable for its torts." *Kielly v. Belcher S. M. Co.*, 3 Saw. 437; M. M. D. 55. "A mining corporation directing the cutting of timber on land not its own, is liable in trespass the same as an individual." *Yaboola River M. Co. v. Irby*, 40 Ga. 479; M. M. D. 55.

<sup>2</sup> *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80. But as to necessity of knowledge by corporation, see *Boston Coal Co. v. Cox*, 39 Md. 1.

<sup>3</sup> *Boone on Cor.*, Sec. 80 and note.

<sup>4</sup> *Harris Damages by Corporations*, Vol 2, § 976; *Berea Stone Co. v. Kraft* (a leading case), 31 Ohio, 287; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Quincy Coal Co. v. Hood*, 77 Ill. 68.

<sup>5</sup> See Chap. *Trespass*.

graph has been recognized by the courts, and following are a few of the decisions in which the courts have held the corporation liable either to third parties or fellow-servants for injuries caused by the negligence of its agents. Thus, in Ohio, a corporation was held liable to a servant for an injury caused by the falling of a stone, occasioned by the negligence of a superior servant;<sup>1</sup> in Michigan the representative of a deceased servant who lost his life by reason of the negligence of a contractor, was permitted to recover from the corporation;<sup>2</sup> but in Pennsylvania the representative of a miner killed by an explosion caused by the negligence of a fellow-servant, was not permitted to recover, the court holding that the risks resulting from the negligence of a fellow-servant were ordinary risks of the employment, and were voluntarily assumed by the contract of employment.<sup>3</sup> In Illinois, a corporation was held liable for an injury from the breaking of a rope, which the evidence showed contained a latent defect;<sup>4</sup> and so they have been held responsible for injuries from the explosion of a furnace;<sup>5</sup> for an injury caused by falling earth;<sup>6</sup> for an injury received from the negligent use of a cage;<sup>7</sup> and for

<sup>1</sup> *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; citing *Little Miami Ry. Co. v. Stevens*, 20 *Id.* 415; *Cleveland C. & C. Ry. Co. v. Keary*, 3 Ohio St. 201; *Whalen v. Mad River & L. E. Ry. Co.*, 8 Ohio St. 249; *P. F. & W. & C. R. Co. v. Devinney*, 17 *Id.* 197.

<sup>2</sup> *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, and see *Harris on Dam. by Cor.* (2), § 977, where the author expresses regrets that this rule should not be universally adopted.

<sup>3</sup> *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Wilson v. Merry*, L. R. 1 H. L. Sc. Cas. 326; *Andresco Oil Co. v. Gilson*, 68 Pa. 146; *contra*, cases *ante*.

<sup>4</sup> *Senior v. Ward*, 1 El & El. 385; *Perry v. Rickets*, 55 Ill. 234.

<sup>5</sup> *McGowan v. LaPlata M. & S. Co.*, 3 McCreary, 393.

<sup>6</sup> *Strahbendorf v. Rosenthal*, 30 Wis. 674; *Hanman v. Coal Co.*, 156 Mo. 232.

<sup>7</sup> *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Durant v. Lexington Coal Mining Co.*, 97 Mo. 62.



an injury to a passer-by in negligently setting off a blast; <sup>1</sup> but in Colorado, the plaintiff was not permitted to recover for an injury from the breaking of a ladder, the court holding such a risk incidental to the servant's employment, and the corporation not an absolute insurer; <sup>2</sup> and in Iowa a miner was denied the right to hold a corporation for an injury received in repairing a shaft, where it appeared that he was a skilled miner, and had been a long while engaged in the same shaft, the court finding from the evidence that he could have discovered the defect causing the injury by the exercise of reasonable diligence.<sup>3</sup> But, subject to such reasonable exceptions as the above, the corporation is held to a strict responsibility for injuries from its agent's neglect.<sup>4</sup>

**§ 326. Power to remove and disfranchise.**—The power to remove officers and disfranchise members for reasonable cause, is incident to the very existence of a corporation and may be exercised, when express authority is given under the charter, by the corporation itself, or by those in whom the power of motion is reposed by the charter.<sup>5</sup> If an officer, or member of a corporation, is guilty of such an infamous offense that he would be subject to indictment at common law; if he is guilty of an open violation or breach of duty as a member of the company, or if he commits offenses that partake of either or

<sup>1</sup> *Wright v. Compton*, 53 Ind. 337; *Taber v. Hutson*, 5 *Id.* 322; *Fisher v. Hamilton*, 49 Ind. 341.

<sup>2</sup> *Couter v. Colo. U. Min. Co.*, 35 Fed. Rep. 41.

<sup>3</sup> *Money v. Lower Vein Coal Co.*, 55 Iowa, 671; citing *Way v. Ill. Ry. Co.*, 40 Iowa, 341; *Muldowney v. Ill. Cen. Ry. Co.*, 39 Iowa, 615; *Kray v. C, R. I. & P. Ry. Co.*, 32 Iowa, 357.

<sup>4</sup> *Cooley Torts*, pp. 137, 138.

<sup>5</sup> *Beach on Cor.*, Chaps. 23, 42; *Brandenburg v. Jefferson Club*, 88 Mo. App. 148.

both of those above referred to, it would be sufficient to justify the corporation to remove or disfranchise such officer or member.<sup>1</sup> In order to justify a corporation, however, to remove an officer or disfranchise a member, for the commission of an indictable offense, it must appear that there has been a previous trial and conviction, before a competent tribunal, according to the laws of the place where the offense was committed; <sup>2</sup> and it is essential in every case of expulsion, that the officer or member accused should be notified a sufficient time beforehand, to enable him to have a fair and impartial trial and a full opportunity to defend himself.<sup>3</sup> No stockholder can be disfranchised in a mining corporation, or other private corporation, owning property, unless the company is given the authority in its charter to deprive such stockholder of his interest in the property of the corporation,<sup>4</sup> and when the charter prescribes the mode by which the power is to be exercised, in the exercise of its authority, the corporation must conform to the requirements of the charter,<sup>5</sup> but where the manner of procedure is not prescribed by the charter, but the power of amotion is generally conferred upon the corporation, it may adopt its own method in the expulsion of members, provided the member is not deprived of his legal rights.<sup>6</sup>

<sup>1</sup> *Ante, idem.* Officers are but agents and their authority terminates as other agents. *Van Dusen v. Star Q. M. Co.*, 36 Cal. 571. But as to necessity of notice from committee, where it is provided for, see *Bates v. Sierra Nevada Co.*, 18 Cal. 171. But a court cannot, by *quo warranto*, remove the officers of a mining corporation. *Neall v. Hill*, 16 Cal. 146.

<sup>2</sup> Until this is shown the member would be entitled to the "legal presumption of innocence," so often indulged in to protect the guilty.

<sup>3</sup> *State v. Adams*, 71 Mo. 570-586.

<sup>4</sup> *Ante.*

<sup>5</sup> And it would seem, upon principle, that the authority should be strictly complied with, as the duties and power border very nearly upon the exercise of judicial and legal functions.

<sup>6</sup> *Dickson v. Chamber of Commerce*, 29 Wis. 45.

§ 327. **How dissolved.** — A mining corporation may be dissolved in any one of the four following ways, *i. e.*, “ (1) By statute, (2) By surrender of its charter, (3) By loss of all its members, and (4) By forfeiture.”<sup>1</sup> In order that a corporation may be dissolved by statute, however, the authority should have been reserved by the charter of the company for that purpose,<sup>2</sup> and the corporation itself, cannot, by any corporate act, work a dissolution of the company for the purpose of avoiding its debts or liabilities;<sup>3</sup> nor will a corporation be dissolved by the resignation of all its officers, or the loss of certain of its members, provided there are sufficient left to continue with the business and fill up the vacancies that have occurred.<sup>4</sup> But according to its terms and the nature of its existence, a corporation may subject itself to a dissolution by surrendering its charter,<sup>5</sup> or by making such a willful misuse of its franchises that it would forfeit them to the State.<sup>6</sup> In order to work a forfeiture, however, the proceedings must have been instituted by the State,<sup>7</sup> and the misuser of its franchises must have resulted from its own willful conduct or neglect, and not produced by mere accident or mistake.<sup>8</sup> If there have been acts on the part of the corporation sufficient to work a forfeiture of its franchises, the forfeiture

<sup>1</sup> See text-books on Corporations.

<sup>2</sup> Otherwise the legislative act of creation would be inconsistent with that of revocation, but generally the reservation is made in the charter.

<sup>3</sup> Insolvency and non-user, however, may furnish ground for a decree of dissolution. *Nimmans v. Tappon*, 2 Saw. (N. Y.) 652.

<sup>4</sup> *Canal Co. v. Ry. Co.*, 4 Gill. & J. (Md.) 1; *N. Y. Marble & Iron Works v. Smith*, 4 Duer, 362.

<sup>5</sup> Like a natural person, it can voluntarily surrender any legal right it has, even to its right to exist.

<sup>6</sup> *Miners Ditch Co. v. Zellerman*, 36 Cal. 543.

<sup>7</sup> *Miners Ditch Co. v. Zellerman*, 36 Cal. 543; *Crump v. U. S. Min. Co.*, 7 Gratz (Va.), 332.

<sup>8</sup> *Ante, idem.*

may be enforced by *scire facias*, where there has been a willful and illegal use of the proper legal authority possessed by the corporation,<sup>1</sup> or by a *quo warranto* proceeding, if the company has not been legally constituted, or is not acting legally in the exercise of its corporate powers.<sup>2</sup> But in the absence of statutory authority a court of equity has no jurisdiction to determine whether a corporation has forfeited its franchise, or violated the provisions of its charter, for the general powers of a court of equity do not extend to this matter, and the question can only be determined by a court of law.<sup>3</sup>

<sup>1</sup> Beach on Cor., § 52.

<sup>2</sup> *Quo warranto* is the common and most ordinary proceeding to determine all abuses of corporate authority.

<sup>3</sup> *Doyle v. Pearless & Co.*, 44 Barb. 239. In the absence of some statutory power a court of equity cannot dissolve a mining corporation and divide its property among the shareholders. *Taylor v. Decatur Lead and Zinc Co.* (Ala. 1901), 112 Fed. Rep. 449.

## CHAPTER XXI.

### PARTNERSHIP IN MINES.

- SECTION 328.** Mining partnerships generally.  
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351. Receivers of mines.  
352. Laches in mining partnerships.

§ 328. Mining partnerships generally. — There is no *delectus personae* in mining, as in other commercial partnerships, and the partnership is not dissolved by the death of a partner, or a sale of the interest of a partner to a stranger, hence a surviving partner has no authority to take control of the partnership property as a

survivor.<sup>1</sup> When a stranger purchases shares in such a partnership, he presumptively becomes a partner, although he may not participate in the management of the partnership affairs.<sup>2</sup> And new members in a mining copartnership are liable for the firm debts before they become members of the firm, if they purchase with knowledge, subject to the payment of such debts.<sup>3</sup>

§ 329. *How partnership is proved.*—The question whether a person is or is not a member of a mining partnership, is determined in precisely the same way as one's membership with an ordinary commercial partnership.<sup>4</sup> It is not necessary to prove articles of copartnership, in order to bind one as a member of a mining partnership, for if he has, as a matter of fact, been dealing as such, he is to all intents and purposes, a partner in the business, although there may have been no articles of copartnership subscribed to,<sup>5</sup> and even though there may be

<sup>1</sup> *Fereday v. Wightwick*, 1 Russ. M. 45; *Decker v. Howell*, 42 Cal. 636; *Jones v. Clark*, 42 Cal. 180; B. & W. L. C. 525; *Charles v. Eshelman*, 2 M. M. R. 65.

<sup>2</sup> *Jefferys v. Smith*, 3 Russ. 158; *Taylor v. Castle*, 42 Cal. 367; B. & W. L. C. 521.

<sup>3</sup> *Duryea v. Burt*, 28 Cal. 569; B. & W. L. C. 489. "An incoming partner is not liable on contracts of the firm, made before he became a member." *Babcock v. Stewart*, 58 Pa. St. 179. "An assignment of his share by a partner in iron works, though made to an insolvent person, is not the less effectual in putting an end to the assignor's liability." *Jefferys v. Smith*, 3 Russ. 158; M. M. D. 261. The distinction between commercial partnerships and mining partnerships, consisting in the absence, in the latter, of the right to select one's partner, is not noted, by some of the authorities, except in the case of partnerships operated on the cost-book principle, which is perhaps the true type of mining partnership. See Chap. *Cost-Book Companies*.

<sup>4</sup> *Lindley Part.*, p. 204, § 148; *Ralph v. Harvey*, 1 Q. B. 845. But see *Hickman v. Cox*, 3 C. B. (N. S.) 523.

<sup>5</sup> *Lyell v. Sanbourne*, 2 Mich. 109; *Nolan v. Lovelock*, 1 Mont. 224; *Duryea v. Burt*, 28 Cal. 569; B. & W. L. C. 489; *Taylor v. Castle*, 42 Cal. 367; B. & W. L. C. 521; *Snyder v. Burnham*, 77 Mo. 52.

articles of copartnership, if the person sought to be charged, has admitted the existence of the firm, he can be charged with the liabilities of a partner, without any evidence of the existence of the articles of copartnership.<sup>1</sup> But such admissions are not necessarily conclusive; evidence is admissible to controvert them on the part of the person sought to be charged, and on proof that they were made under erroneous circumstances, very little weight ought to be attached to them.<sup>2</sup> The liability sought to be charged by such admissions may also be avoided by proof that the partnership only extended to a limited extent or that the defendants were partners in some particular transaction, but not partners to the extent and for the purposes relied upon by those seeking to avail themselves of such admissions.<sup>3</sup> And where it is sought to charge one as a member of a mining partnership by showing acts on his part which would lead to such a presumption, or by showing acts of others, done with his knowledge or consent, the statements or acts of his alleged copartners are not admissible in evidence until they have been shown

<sup>1</sup> *Lindley Part.*, pp. 151 and 152; *Ralph v. Harvey*; *Richards v. Harvey*, 1 Q. B. 845. Partnership may either arise by operation of law, as where there is a joint working of mine and no agreement, or where the parties form a partnership by agreement. *Freeman v. Hemmenway*, 75 Mo. App. 611.

<sup>2</sup> *Greenl. on Evid.* (Vol. II.), §§ 177-189-207-527; *Whitney v. Ferris*, 10 Johns. 66; *Harris v. Wilson*, 7 Wend. 57; *Buckman v. Bowmer*, 15 Conn. 68.

<sup>3</sup> *McKnight v. Ratcliff*, 44 Pa. St. 156; *Patterson v. Silliman*, 28 Pa. St. 304. "Admissions made by him before or after the debt was incurred may be evidence for this purpose." *Ralph v. Harvey*; *Richards v. Harvey*, 1 Q. B. 845; *M. M. D.* 256. "A mining partnership may be inferred from facts and circumstances, as by suffering names to be used jointly, and otherwise holding themselves out as partners." *Lyell v. Sanbourn*, 2 Mich. 109; *M. M. D.* 256. Joint working constitutes partnership. *Ferris v. Baker*, 127 Cal. 520; 59 Pac. Rep. 927; *Childers v. Neely* (W. Va.), 34 S. E. Rep. 828; *Miller v. Hale*, 96 Mo. App. 427.

to be connected in some way with each other, for, as observed by Mr. Lindley in his excellent work on partnerships: "It is obviously reasoning in a circle to infer a partnership from acts of theirs, until those acts can be imputed to him for some other reason than that he and they are partners."<sup>1</sup> But if such acts and admissions occur in the presence and hearing of the party sought to be charged, they could under certain circumstances be admitted in evidence to prove a partnership.<sup>2</sup> This subject, however, belongs more properly to a work on evidence and the reader is referred there for a more specific treatment.

§ 330. **Agreements for mining adventure.** — The fourth section of the statute of frauds is the only statutory enactment, applying to ordinary contracts for future partnership in land for mining purposes.<sup>3</sup> This section applies not only to agreements for a partnership, to commence more than a year from the date of the agreement, but it also applies to an agreement for a present partnership, to last more than a year from its commencement, and before such contracts are capable of being enforced, they must have been reduced to writing and signed by the parties to be

<sup>1</sup> Lindley on Part., *supra*; Greenl. on Evid., *supra*.

<sup>2</sup> *Ralph v. Harvey*; *Richards v. Harvey*, *supra*. As to evidence of membership from attending meetings, and holding oneself out as a member, see *Hedge's App.*, 11 M. M. R. 463. The intention of parties, as gathered from the contract, is the real test of the existence of a partnership, and the contract must fix the real status of the parties toward each other. *Hazell v. Clark*, 89 Mo. App. 78. Receiving part of the profits of a partnership in lieu of interest on a loan does not make the lender a partner. *Hazell v. Clark*, 89 Mo. App. 78. An agreement that all net proceeds of ore shall be applied on mortgage debt, does not make mortgagee a partner with mortgagor. *Chung Lee v. Davidson* (Cal.), 86 Pac. Rep. 519.

<sup>3</sup> *Coddick v. Skidmore*, 2 De G. & J. 52. As to contract between lessor and lessee, creating partnership, see *Catskill Bank v. Gray*, 14 Barb. 472.



charged.<sup>1</sup> But if the parties have acted on the agreement and become partners, the statute does not apply in either case, for the equitable doctrine of part performance then takes the agreement from the statute.<sup>2</sup> The statute applies also to agreements for partnerships relating to land, and after a partnership is shown to exist, parol evidence can be introduced to prove that its property consisted of land and that the agreement was within the operation of the statute, and whenever the partnership business extends to the buying and selling of land, the agreement for the partnership must be evidenced by some instrument in writing.<sup>3</sup>

<sup>1</sup> MacSwinney, p. 184. An arrangement whereby parties conducting mining operations are to divide the work and expenses, constitutes a partnership. *Lyman v. Schwartz*, 18 Colo. App. 318; 57 Pac. Rep. 735. Where two own an interest in mine, but only one is engaged in operating it, no partnership exists. *Anaconda Cop. Co. v. Butte Min. Co.*, 17 Mont. 519; 43 Pac. Rep. 924.

<sup>2</sup> *Blsp. Prin. Eq.* 343-395; *Adams Eq.*, § 86; *Britain v. Rossiter*, 11 Q. B. Div. 180; *Arguello v. Edinger*, 10 Cal. 150; *Park v. Wright*, 20 Mo. 35.

<sup>3</sup> *Fox v. Frith*, 10 M. & W. 131; *Cor. & M.* 502; *B. & W. L. C.* 557-558. "The rule that all who participate in profits are liable as partners is subject to many exceptions. H. entered into articles of agreement with B. and C. by which he leased to them certain coal mines, but without rent, and was 'to furnish the funds necessary to conduct the said coal business,' etc. B. and C. were to receive two-thirds of the profits, and H. one-third. This agreement was held not to constitute a partnership." *Heckert v. Fegely*, 6 W. & S. 139; *M. M. D.* 264. "An agreement whereby certain parties furnished one of their number with a fixed amount of money, he to go to Alaska, and prospect for a mine, and they, during his absence, to furnish his family with a stipulated monthly allowance for their maintenance, each of the parties to have a certain prescribed interest in whatever was found, could not be construed as binding the other parties for expenses incurred by the prospecting partner for personal supplies after, or even before, the sum originally furnished had been exhausted." *Hartney v. Gosling*, 68 Pac. Rep. 1118 (Wyo. 1902). When two or more persons acquire an interest in lands apparently for the sole purpose of working the

§ 331. Same — Parol agreements for partnerships relating to land.— Some of the authorities hold that the statute of frauds does not prevent the introduction of parol evidence to establish an agreement to form a partnership relating to lands, but the holding in these cases is perhaps owing to the fact that the court did not keep in mind the distinction between the establishment of an agreement to form a partnership and the establishment of the partnership itself. What is a partnership is a question of law, while the existence of the partnership is a mere question of fact, hence the better opinion is that such an agreement should be evidenced by some instrument in writing.<sup>1</sup>

§ 332. Agreements to share profits. — In mining, as in ordinary commercial partnerships, an agreement to share profits, unless an intention to the contrary can be shown, is held to constitute the persons copartners, who enter into

mines therein they must be considered as having formed a commercial partnership therefor. *Freeman v. Hemmenway*, 75 Mo. App. 611. For agreement to prospect and share losses and profits, not constituting partnership, see *Holton v. Guinn*, 76 Fed. Rep. 96.

<sup>1</sup> *Fox v. Frith*, 10 M. & W. 181; *Coddick v. Skidmore*, 27 L. J. Ch. 158; and see *Brown v. Byers*, 16 M. & W. 262; *Blanchard & Weeks Ltd. Cas.* 556-557; *MacSwinnney on Mines*, pp. 184, 185. "An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those qualified partnerships common in California, known as mining partnerships." *Settembre v. Putnam*, 80 Cal. 490; B. & W. L. C. 514; M. M. D. 262. "A mining prospecting partnership is not governed by technical rules of the law of commercial partnership." *Boucher v. Mulverhill*, 1 Mont. 806; M. M. D. 263. "When land is brought into a partnership as stock, it is, as between the partners, their creditors and one who has knowingly dealt with them for it, personalty belonging to the firm." *West Hickory M. A. v. Reed*, 80 Pa. St. 88; M. M. D. 260.

such an undertaking.<sup>1</sup> The older cases hold that the community of profits is the most reliable test for determining the existence of a partnership,<sup>2</sup> and it is held in many of the later cases that an agreement to share profits has all the essentials of a partnership,<sup>3</sup> but according to the weight of authorities this is not considered a reliable test, for the existence of a partnership is a question to be determined according to the intention of the parties who compose the firm, by a consideration of the whole agreement into which they have entered, and the surrounding facts and circumstances,<sup>4</sup> and a mere agreement to share in the profits of a mine, does not necessarily constitute persons so engaging partners, *inter sese*, unless from the whole agreement into which they have entered, such was the intention of the parties.<sup>5</sup> And where the agreement to share profits is only executory, or a partnership alone contemplated at some future time, the persons entering into such a contract could not be considered partners until the arrival of the time agreed upon.<sup>6</sup> But an agreement to share profits amounts, *prima facie*, to an

<sup>1</sup> *Settembre v. Putnam*, 30 Cal. 490; *Snyder v. Burnham*, 77 Mo. 52.

<sup>2</sup> *Jeffries v. Smith*, 3 Russ. 158; *Owen v. Van Nester*, 1 Eng. L. & Eq. R. 396; *Collyer on Mines*, p. 28.

<sup>3</sup> See *Duryea v. Burt*, 28 Cal. 569; *Rockwell on Mines*, p. 578; 3 Kent Com. 42; *Snyder v. Burnham*, 77 Mo. 52. Where it is held that persons engaged jointly in a mining adventure are partners without any partnership agreement and where the facts were that the party charged, was to be reimbursed for money advanced, by mineral prospectively to be raised from the ground. But see *Butler v. Henckley* (Colo.), 30 Pac. Rep. 250, where such an advancement secured by an assignment of the mine was held not to constitute a partnership. Also *Butler v. Metcalf*, *Id.* 253, and *Horton v. New Pass Gold & Silver Min. Co.* (Nev.), 27 Pac. Rep. 376.

<sup>4</sup> *Lindley on Part.*, p. 33; *Newberber v. Friede*, 23 M. A. 731.

<sup>5</sup> *Lindley Part.*, pp. 33 to 37; *Kellogg Co. v. Farrell*, 88 Mo. 594; *Priest v. Chonteau*, 85 Mo. 398.

<sup>6</sup> *Lindley Part.*, p. 53.

agreement to share the losses,<sup>1</sup> and as this is really the true type of a partnership contract, when persons are so engaged, or after the lapse of the time when the right to share the profits should accrue, as the liabilities are but incidental and necessary to the enjoyment of the profits,<sup>2</sup> such persons will generally be considered as standing on identically the same footing as ordinary partners.<sup>3</sup>

§ 333. **Partners distinguished from co-owners.** — Tenants in common, or joint tenants of a mine, may or may not be partners; but it is almost impossible for co-owners of a mine to work it themselves without becoming partners, if not in the mine itself, in the profits of the mine, at least, and they are regarded rather as partners in trade, than as mere tenants in common in the land.<sup>4</sup> If the owners are partners both in the profits and in the mine itself, then their mutual rights and obligations are determined by the laws governing a mining partnership;<sup>5</sup> but if the owners are not partners, either in the mine or in the profits, their respective rights and obligations are determined by the law of co-ownership,<sup>6</sup> and, in this case, each and every co-

<sup>1</sup> *Phillips v. Sewall*, 11 M. M. R. 419. But the contrary may be shown, notwithstanding this would lead to a presumption that the relation existed. *Supra*.

<sup>2</sup> *Phillips v. Sewall*, *supra*; *Musler v. Trumpbour*, 11 M. M. R. 260; *Bybee v. Hawke*, 11 M. M. R. 594; *Dougherty v. Creary*, 1 M. M. R. 35; *Nolan v. Lovelock*, 9 M. M. R. 360.

<sup>3</sup> *Lindley Part.*, pp. 20 to 62; *Musler v. Trumpbour*, 11 M. M. R. 260; *Bybee v. Hawke*, 11 M. M. R. 594; *Crowshay v. Moule*, 11 M. M. R. 223; *Nolan v. Lovelock*, 9 M. M. R. 360; *MacSwinney on Mines*, p. 115.

<sup>4</sup> *Wade's Am. Min. Laws*, p. 213; *Duryea v. Burt*, 28 Cal. 569; *B. & W. L. C.* 489; *Skillman v. Lachman*, 23 Cal. 198; *Duryea v. Burt*, 11 M. M. R. 395; *Dougherty v. Creary*, 1 M. M. R. 35; *Nolan v. Lovelock*, 9 M. M. R. 360.

<sup>5</sup> *Lindley on Part.*, 51, 54; *Bradley v. Harkness*, 11 M. M. R. 389.

<sup>6</sup> *Lindley on Part.*, 54; *Bradley v. Harkness*, *supra*. "The parties

owner in the mine is entitled to an account of what the other co-owners have received from the mine, over and above their individual shares.<sup>1</sup> Each owner can transfer his interest in the mine, without the consent of the other co-owners,<sup>2</sup> or is entitled to have his interest in the mine partitioned from that of the other tenants;<sup>3</sup> but further than this the rights and obligations of different co-owners in a mine, are governed substantially by the general rules of law applying to mining partnerships, and their rights would be adjusted accordingly, not only in conflicts between themselves, but also in disputes with third parties.<sup>4</sup>

§ 334. Same — Co-owners partners in profits only. — Where the co-owners in a mine work the mine jointly but are partners in the profits of the mine only, the relation established is somewhat peculiar in its effect, for while as to third persons their obligations would perhaps be determined according to the general law of partnership, the law applying to their true condition would determine in conflicts as between themselves, and their mutual rights and obligations would be governed partly by the laws of

owning a mining claim as tenants in common, and engaged in working the same, are partners." *Dougherty v. Creary*, 30 Cal. 290; *M. M. D.* 266.

<sup>1</sup> *Lindley Part.*, *supra*; *Settembre v. Putnam*, 30 Cal. 490; *Blan. & Weeks Ld. Cas.* 515; *MacSwinney*, p. 113; *Bentley v. Bates*, 4 Y. & C. Eq. Ex. 182; *Roberts v. Eberhardt*, Kay, 148.

<sup>2</sup> *Kahn v. Central Smelting Co.*, 11 Rep. 249 (S. C. U. S.); *Dougherty v. Cleary*, 30 Cal. 290; *Decker v. Howell*, 42 Cal. 636; *B. & W. L. C.* 508; *Wade Am. Min. Laws*, p. 218; *Skilman v. Lackman*, *supra*.

<sup>3</sup> *Hughes v. Devlin*, 23 Cal. 501; *B. & W. L. C.* 811.

<sup>4</sup> *Decker v. Howell*, 42 Cal. 636; *Wade's Am. Min. Laws*, 218 *et sub.*; *Nolan v. Lovelock*, 9 M. M. R. 360. This distinction is drawn between cotenancy and partnership in the following cases: *Vietti v. Nesbitt*, 22 Nev. 390; *Cline v. James*, 101 Fed. Rep. 787; *Grubb's App.*, 66 Pa. St. 117; 20 Am. & Eng. Enc. Law (2 Ed.), 787, 788.

partnership and partly by the laws of co-ownership.<sup>1</sup> The following are perhaps the principal propositions of law applying to parties occupying such a position: (1) Each co-owner can transfer his interest in the mine and partnership, without the consent of the other co-owners.<sup>2</sup> (2) Each co-owner can maintain an action for an accounting,<sup>3</sup> without seeking a dissolution of the partnership.<sup>4</sup> (3) In a dissolution of the partnership the mine must be divided between the several owners, unless it can be sold under a statute providing for a sale in lieu of dissolution.<sup>5</sup> (4) A deceased partner's share in a mine, of which he was a partner, goes to his real and not his personal representatives.<sup>6</sup> (5) In case of a dissolution the court can appoint a receiver and have the mine operated for the benefit of the co-owners.<sup>7</sup> (6) The obligation of each co-owner to account to the others gives each partner a lien on the shares of his copartners for what is due them from the settlement.<sup>8</sup>

<sup>1</sup> Lindley on Partnership, Sec. 54; MacSwinney Mines, p. 112. Several persons owning oil or gas together are cotenants, not copartners. *Savings Bank v. Osborne*, 159 Pa. St. 10. But see *Brown v. Beecher*, 120 *Idem*, 590. A mere agreement to divide the profits from the purchase and sale of lands does not constitute the parties copartners. *Hughes v. Ewing*, 162 Mo. 261; 62 S. W. Rep. 465.

<sup>2</sup> *Decker v. Howell*, 42 Cal. 636; B. & W. L. C. 508; Lindley Part., Sec. 56, p. 69; *Bentley v. Bates*, 4 Y. & C. Ex. 182.

<sup>3</sup> MacSwinney Mines, p. 111; *Crowshay v. Maule*, 1 Swanst. 517. For partnership in mines in land held by partners as cotenants, see *Patrick v. Weston*, 22 Colo. 45; 43 Pac. Rep. 446.

<sup>4</sup> MacSwinney Mines, pp. 114-117; *Wade's Am. Min. Laws*, p. 212, § 151; *Kahn v. Central Smelting Co.*, 102 U. S. 641.

<sup>5</sup> Lindley on Part. 498; MacSwinney Mines, pp. 139, 141. See Chapter, *Partition of Mines*.

<sup>6</sup> *Ante, idem*.

<sup>7</sup> *Jeffries v. Smith*, 1 Jac. & W. 298. See also *Blan. & Weeks Ltd. Cas.* 568.

<sup>8</sup> Lindley on Part. 54, 56, 498. See also *Fereday v. Wightwick*, 1 R. & M. 45; 11 M. M. R. 247.

§ 335. **Same — Rights and remedies of co-owners.** — As before explained, the rights and remedies of co-owners differ materially from the corresponding rights and remedies of copartners in a mine.<sup>1</sup> Where the co-owners are partners in the profits any one of the several co-owners may maintain an action for an accounting, and exercise the partner's right of lien, the same as though they were copartners in the mine.<sup>2</sup> But in order to arrive at a thorough understanding of the law governing the relative rights and obligations of co-owners in a mine, it is necessary to notice the distinction in the law, applying to cases where the interest extends to the land itself, and cases where the co-owners have but a chattel interest in the mine.<sup>3</sup> The statute, (4 Anne, C. & B., § 27) applies, where the ownership extends to the land, and gives one co-owner the right to maintain an action for an accounting against his other co-owners.<sup>4</sup> At common law, however, one co-owner of a chattel interest had no recourse against his co-owners, except where the common property was actually destroyed, for the reason that there was no contractual relation between them upon which such liability could be predicated.<sup>5</sup>

<sup>1</sup> *Ante*; *Bradley v. Harkness*, 11 M. M. R. 389. "Tenants in common of a mine, working it together, and, after paying expenses, dividing the profits in proportion to their interests in the claim, are mining partners." *Nolan v. Lovelock*, 1 Mont. 224; M. M. D. 261, 266.

<sup>2</sup> *Lindley Part.*, p. 109, § 64; *Wade Am. Min. Laws*, § 151, p. 212; *Kahn v. Cen. S. Co.*, 11 Rep. 249; cited *supra*. But see *MacSwinney*, p. 112; *Early v. Friend*, 14 M. M. R. 271.

<sup>3</sup> See *Lindley, supra*. In a mere cotenancy, there is no resulting trust relation. *Tuck v. Downing*, 7 M. M. R. 84. A single tenant cannot mine. *Murray v. Haverly*, 14 M. M. R. 325. Or sell any definite part of the common property. *Boston Co. v. Condit Co.*, 14 M. M. R. 301; *Marsh v. Holley, idem*, 308. .

<sup>4</sup> *Lindley on Part., supra*. For measure of accountability in such case, see *Graham v. Pierce*, 14 M. M. R. 308.

<sup>5</sup> *Ante, idem*. But see *Gore v. McBrayer*, 18 Cal. 583.

But under the Roman law, a liability *quasi ex contractu* was predicated in such cases, and it was held that every co-owner ought to account to the others for the profits received by himself, and to contribute with them to the expenses properly incurred for the common benefit;<sup>1</sup> and although the common law rule still continues unimpaired, courts of equity have adopted principles similar to those which obtained under the Roman law, and this mollifies the harshness of the common law rule.<sup>2</sup>

§ 336. **Same — Equity's jurisdiction in such cases.** — Where mines are owned and operated by several persons in common, equity has jurisdiction similar to that exercised in cases of copartnerships, to adjust the rights of the several co-owners.<sup>3</sup> Where there is a joint undertaking to work a mine a partnership arises, so far as the working is concerned, but it does not extend to the land. But where there is evidence which goes to show that the whole property was intended to be used in the business, then the partnership would extend to the land.<sup>4</sup> Equity would, in such case, on the proper showing, if the property could not be worked profitably to the several owners, appoint a receiver, take an accounting, and having once exercised jurisdiction, proceed to adjust the rights of the contending claimants.<sup>5</sup>

<sup>1</sup> See authorities, *supra*; *Early v. Friend*, 14 M. M. R. 271.

<sup>2</sup> *Lindley Part.*, pp. 109 and 110. Cotenant is liable for all that he receives over his share. *Huff v. McDonald*, 14 M. M. R. 262.

<sup>3</sup> *Baln. on Mines*, 116. But the legal title must be first established. *North Pa. Co. v. Snowden*, 14 M. M. R. 294.

<sup>4</sup> *Foster v. Hale*, 5 Ves. 308; *B. & W. L. C.* 561; *Story Part.*, § 93; 3 Kent, 37, 38; *Dyer v. Clark*, 5 Metc. 562.

<sup>5</sup> "The peculiar fitness of a court of equity to regulate the affairs of tenants in common in mines, has never been questioned. (*Adams v. Briggs Iron Co.*, 7 Cush. 361; *Baln. on Mines*, 116.) Where there is a difficulty in making partition of a mine, the court will, under proper



§ 337. **Devisees of mines.** — The general rule of law is, that where land is acquired for the purpose of carrying on a partnership business, whether the acquisition is gratuitous or not, if it is used for that purpose it is considered property of the partnership, and in accordance with this proposition it is held that where a mine is devised to several persons to be worked by them in partnership, the interest in the land devised, as well as in the mine, will be considered as partnership property.<sup>1</sup> But in the absence of evidence going to show that the land had been treated as ancillary to the partnership business, the land itself would not become a part of the partnership property, but the mine alone would be so treated.<sup>2</sup>

§ 338. **When shares in mines considered realty.** — Shares in mines may or may not be considered real estate. An interest in a mine is not necessarily real property, but it does not follow that it has all the attributes of goods and chattels. Shares in mines are not goods and chattels within the seventeenth section of the statute of frauds, requiring agreements for the sale of goods, wares and merchandise, to be in writing, if of the price of ten pounds or upward, but they are considered legal assets and will

circumstances, order a sale. (*Rickards v. Rickards*, 36 L. J. Ch. 176. But see *Dall v. The Confidence Silver Mining Co.*, 3 Nev. 531.)" *Blanchard & Weeks Ltd. Cas.*, p. 326.

<sup>1</sup> *Lindley on Part.*, 333. *Britsben's App.*, 70 Pa. St. 408. "A devise of lands to one person and of mines or pits to another, passed only mines and pits which were open at the date of the will before the new statute of wills (7 Will. 4 & 1 Vic., c 26). Query, whether since that statute mines open at death of testator would pass?" (Per M. R.) *Brown v. Whiteway*, 8 Hare, 150; M. M. D. 75.

<sup>2</sup> *Brown v. Whiteway*, 8 Hare, 150; *Mor. Min. Dig.*, p. 75. See *Crowshay v. Maule* (1 Swans. 495), where a will was held to create a partnership in trade. Also *Mor. Min. Dig.*, p. 260.

pass under a bequest of personalty.<sup>1</sup> But if the share is an interest in the land, as land, rather than an interest in a money capital, then it is considered real estate within the fourth section of the statute of frauds;<sup>2</sup> while a share representing merely a money interest is not realty, within the fourth section of the statute of frauds.<sup>3</sup>

§ 339. **Partner's authority to bind firm.** — Unless there is an express agreement to the contrary, of which the parties trading with the members of the firm, had notice, one member of a mining partnership can bind the other members of the firm, for what is useful and necessary in the mining operations,<sup>4</sup> and while a partner cannot, ordinarily, bind the different members of the firm on any species of commercial paper,<sup>5</sup> the different members of a mining partnership can be made liable on commercial paper given by one of the firm, in some particular transaction, by their own conduct, or some overt act, by which they have virtually acknowledged the liability as one of

<sup>1</sup> Lindley on Partnership, 82. But see *Johnson v. Cowen*, 9 M. M. R. 300.

<sup>2</sup> *Caddick v. Skidmore*, 2 De G. & J. 52; 13 M. M. R. 383.

<sup>3</sup> *Powell v. Jessopp*, 118 C. B. 335; *Mor. Min. Dig.*, p. 341.

<sup>4</sup> *Nolan v. Lovelock*, 1 Mont. 224. And this applies to a dormant partner. *Burgon v. Lylle*, 11 M. M. R. 287. Whether or not the party dealing with the firm has had sufficient notice is a question for the jury. *Vice v. Fleming*, 7 Y. & J. 327; *Carter v. Whaley*, 1 B. & Ad. 11.

<sup>5</sup> *Langon v. Davey*, 11 M. & W. 218; *Ex parte Bonbonus*, 8 Ves. 540; *Ex parte Nolte*, 2 G. & J. 295; *Duncan v. Lowndes*, 3 Camp. 478; *Wait's Acts. & Def.*, Vol. IV., p. 435; *Skillman v. Lackman*, 23 Cal. 198; *Gillig v. Bigle Co.*, 2 Nev. 214. But see *Decker v. Howell*, 42 Cal. 636; *Jones v. Clark*, 42 *Id.* 180. The following authorities hold there is no liability upon commercial paper, without proof of special circumstances or authority: *Tiedeman Com. Pap.*, p. 164; *Brumah v. Roberts*, 3 Bing. N. C. 96; *Dickinson v. Valpy*, 10 B. & C. 128, a leading case by *Littledale, J.*; *Brown v. Kilgen*, 11 M. M. R. 343; *Ricketts v. Bennett*, 11 M. M. R. 278. But see *Tredman v. Bourne*, 11 M. M. R. 268.

the firm obligations.<sup>1</sup> Generally, however, one member of a mining partnership cannot bind the different members of the firm on any species of commercial paper, or delegate any authority by which another could bind the firm by drawing or accepting bills of exchange, or by giving notes or bills in payment for firm debts, unless the transaction is ratified by the other members of the firm, or the partner has the authority to bind the firm by virtue of express stipulation, or a recognized custom or usage of the firm.<sup>2</sup>

§ 340. **Same — How partnership liability determined.**— The authority of one partner to bind the firm is limited to things done in the regular course of the firm business and for such things as are necessary for carrying out the business of the firm. According to the later decisions the liability of the firm for the acts of its individual members is not so extensive as the popular opinion among the laymen generally would have it.<sup>3</sup> Where no actual authority or

<sup>1</sup> *Owen v. Van Uster*, 10 C. B. 318 (20 L. J. C. P. 61); *Healy v. Story*, 3 Exch. 3; *Walt's Act. & Def.* (Vol. 4), p. 436. See also *Babcock v. St. Wort*, 51 Pa. St. 181; *Fox v. Frith*, 10 M. & W. 130; 1 Cor. & M. 502; *Faith v. Richmond*, 11 Ad. & El. 339.

<sup>2</sup> *Ex parte Barbons*, 8 Ves. 540; *Ex parte Nolte*, 2 G. & J. 295; *Ex parte Bowers*, 2 M. & S. 484; *Duncan v. Landers*, 3 Camp. 478. "A portion of the members of a mining partnership procuring money on their individual note from a third party for the purposes of the mine, are liable to each other for contribution. It is not a partnership transaction." *Sedgwick v. Daniell*, 2 H. & N. 319; M. M. D. 263.

<sup>3</sup> *Lindley Part.*, p. 816. "The members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit for the purpose of working the mines, if that appear to be necessary or usual in the management of the mines." *Tredeven v. Bourne*, 6 M. & W. 461; M. M. D. 261. "Each partner is the general agent of the others." *Hawken v. Bourne*, 8 Id. 708; M. M. D. 261. "A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine, out of the joint profits derived from the sale of the minerals." *Roberts v. Eberhard*, 1 Kay, 148; M. M. D. 261.

ratification can be shown on the part of the firm, of the acts of its individual members, the necessity of the act for carrying on the firm business, in the ordinary way, is made the test for determining the authority of an individual member to bind the firm by a given act, and the consequent liability of the firm for such an act.<sup>1</sup> This test, however, is not at all times reliable, for, of course, the nature of the business itself, must determine the necessity of a given act for such business; an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for carrying on another, and hence, it is almost impossible, in the abstract, to determine just what kind of transactions on the part of an individual member of a firm would operate to bind the firm.<sup>2</sup> But the mere necessity of an act will not alone be sufficient to bind the firm, for the unauthorized acts of one of its individual members, unless the necessity for such an act was one which existed for the legitimate business of the firm and arose from carrying on the business of the firm in the usual way and under ordinary circumstances.<sup>3</sup> An extraordinary necessity, therefore, or one which arose under extraordinary circumstances, would not be sufficient to hold the firm responsible. So, in the light of the decisions, the test for determining the liability of the firm might more properly be said to be the *ordinary necessity* of the unauthorized acts of the individual partners, for carrying on the business of the firm.<sup>4</sup>

<sup>1</sup> Lindley Part., *supra*; Duncan v. Lowndes, 3 Camp. 478. Firm is *prima facie* liable for necessary or usual dealings on credit. MacSwinney, p. 122.

<sup>2</sup> Lindley Part., p. 318; Steinberger v. Carr, 8 Mon. & G. 191; Carter v. Whaley, 1 B. & Ad. 11.

<sup>3</sup> *Ante, idem*; Skillman v. Lachman, 23 Cal. 198; Gillig v. Lake Bigler & Co., 2 Nev. 214; Pott v. Eyton, 3 Com. B. 82.

<sup>4</sup> Lindley Part., p. 316. For "usual dealings" the firm, generally, would be liable. MacSwinney, p. 122. But not so for "unusual," or

§ 341. **Same — Liability for supplies furnished firm.** — The law is well settled that any one or more members of a mining partnership may bind the other members of the firm for whatever is useful and necessary in the joint undertaking, unless there is an express agreement to the contrary, of which the contracting party had notice.<sup>1</sup> It is generally supposed that the liability of members of a mining copartnership is limited and that they are in no case liable for the debts of the mine after the transfer of their interest in the firm, or, in the case of a cost book company, after the payment of the calls upon their shares. This is not a correct idea in regard to their liability, however, for the liability of members of a mining copartnership is

unnecessary things. *Idem*, p. 128. "A partner in an undertaking is, by virtue of that relation, constituted a general agent for his copartners in all matters relating to the partnership; and he has all the authority necessary for carrying on the undertaking, and all such as is usually exercised by the partnership." *Oatey v. Bourne*; *Hawkins v. Bourne*, 10 L. J. Ex. 361; 8 M. & W. 703; M. M. D. 260. "All the partners are liable for the negligence of one producing injury to a miner employed." *Ashworth v. Stanwix*, 80 L. J. Q. B. 183; M. M. D. 267. An incoming partner is not liable for debts contracted prior to his purchase. *Patrick v. Weston*, 22 Colo. 45; 43 Pac. Rep. 446.

<sup>1</sup> *Lindley Part.*, § 200; *Wait's Act. & Def.*, p. 435; *Nolan v. Lovelock*, 1 Mont. 224; *MacSwinney*, p. 122. "S. and others carried on business under the name of 'Plas Madoc Colliery Company.' S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.'s withdrawing: *Held*, that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it." *Carter v. Whalley*, 1 B. & Ad. 11; M. M. D., p. 269. "In a mining partnership pure and simple one partner has no implied authority to borrow money on the credit of the firm, but his implied powers only permit him to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management of the business." *Hartney v. Gosling* (Wyo. 1902), 62 Pac. Rep. 1118. A member of a mining partnership has not the same authority as a member of a trading firm. *Patrick v. Weston*, 22 Colo. 45; 43 Pac. Rep. 446.

governed by substantially the same rules that apply in the case of ordinary partnerships.<sup>1</sup> It is true in mining as other commercial partnerships, that one member of the firm may avoid the firm indebtedness, as between himself and his copartners, by transferring his interest in the firm, pursuant to an agreement that he shall not thenceforth be held responsible by the creditors of the firm, and if such an agreement is acquiesced in by the creditors it would extend also to them;<sup>2</sup> but their liability for debts of the firm for what is necessary for their joint undertaking, is not essentially different from that of members of an ordinary commercial partnership, and can be no easier avoided.<sup>3</sup> But in the absence of an express authority, or a local custom or usage to the contrary, the firm would not be responsible for a note executed by one of the members of the firm, even though it were given in payment for supplies useful and necessary for the firm business;<sup>4</sup> and under Sta. 32 & 33 Vic., c. 19, 25, shareholders in a cost-book mining company are not liable for the debts of the firm if they have ceased to be shareholders in the company for at least two years before the company quit working the mine upon which the indebtedness occurred, or before the winding-up order.<sup>5</sup>

<sup>1</sup> Lindley Part., § 146, p. 209; *Crowshay v. Maule*, 11 M. M. R. 223.

<sup>2</sup> *Burnside v. Tetzner*, 68 Mo. 107; *MacSwinney Mines*, p. 122.

<sup>3</sup> Lindley on Part., *supra*; *Nolan v. Lovelock*, 9 M. M. R. 260; *Roberts v. Eberhardt*, 11 M. M. R. 301; *Skillman v. Lachman*, 11 M. M. R. 381.

<sup>4</sup> *Walt's Act. & Def.*, § 9 (Vol. 4), p. 435; *Skillman v. Lachman*, 28 Cal. 198; *Gillig v. Lake Bigler & Co.*, 2 Nev. 214. "A managing superintendent cannot bind a mining partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized." *Jones v. Clark*, 42 Cal. 180; *B. & W. L. C.* 525; *M. M. D.* 261.

<sup>5</sup> Lindley Part., § 176, p. 209, and footnote.

§ 342. **Same — Liability on commercial paper.** — Mining, like other non-trading partnerships, are not organized for the purpose of borrowing money or issuing commercial paper; and the firm is not, generally, liable for money borrowed by one of the partners,<sup>1</sup> or for any species of commercial paper executed in the name of the firm.<sup>2</sup> Where a partner exceeds his authority in borrowing money or executing commercial paper, he would be individually liable for the same,<sup>3</sup> but where it appeared that the money was used for the firm's business, the firm would, no doubt, be held liable therefor.<sup>4</sup>

§ 343. **Same — By conveyance of partnership property.** — One partner cannot bind his copartners by deed, without special authority, or unless executed in their presence, and by their consent or subsequent ratification,<sup>5</sup> for one partner has no implied authority to convey the real estate of the firm;<sup>6</sup> and although the partner executing the deed would himself be bound by the conveyance,<sup>7</sup> it cannot operate to bind the other members of the firm, without

<sup>1</sup> *Burmester v. Norris*, 6 Exch. 796; *German Mining Co., 4 De G., M. & G.* 35.

<sup>2</sup> *Ducarrey v. Gill*, M. & M. 450; *Bentley v. Bates*, 4 Y. & C. Eq. Ex. 191; *Brown v. Byers*, 16 M. & W. 252; *Tiedeman Com. Pap.*, p. 164; *Dickinson v. Valpy*, 10 B. & C. 128; *Brown v. Kilger*, 11 M. M. R. 343.

<sup>3</sup> *Owen v. Van Usder*, 10 C. B. 318.

<sup>4</sup> *German Mining Co., 4 De G., M. & G.* 19. Such use would render the firm liable by way of ratification. *Harrison v. Heatharn*, 6 M. & G. 81.

<sup>5</sup> *Lindley Part.*, § 278; *Harrison v. Jackson*, 7 T. R. 207; *Fitchburn v. Boyer*, 5 Watts, 159; *Snyder v. May*, 19 Penn. St. 235; *McDonald v. Eggleston*, 26 Vt. 154; *Doe v. Tupper*, 12 Miss. 261; *Bentrim v. Zierlin*, 4 Mo. 417; *Ruffner v. McConnell*, 17 Ill. 212.

<sup>6</sup> *Ruffner v. McConnell*, 17 Ill. 212; *Walton v. Tosten*, 49 Miss. 569; *Lindley Part.*, § 278, p. 390 and cases cited.

<sup>7</sup> *Elliott v. Davis*, 2 Bos & P. 338; *Kosson v. Bocker*, 1 N. W. Rep. (U. S.) 418; *Day v. Lafferty*, 4 Ark. 450; *Price v. Alexander*, 2 G. Green, 427; *Pettes v. Bloomer*, 21 How. Pr. 317.

an express authority from them to be so bound.<sup>1</sup> The assent of the other partners, however, could from the circumstances be implied,<sup>2</sup> and a deed executed by one partner in the name of the firm, may be treated as a deed of all the partners, upon proof of an express authority delegated prior to the execution of the instrument, or a subsequent ratification of the unauthorized act.<sup>3</sup> The same rules apply in the case of leases and other instruments under seal, and before one partner can bind the firm, a previous express authority must generally be shown, or a subsequent ratification,<sup>4</sup> for the reason that the partners are mere tenants in common as to such realty, and unless the property was purchased with partnership funds, and used for the purposes of the partnership only, each associate, in contracting with reference thereto, must contract in his own individual name;<sup>5</sup> but if the property leased was purely partnership property and was only used for the purposes of the firm, it would then be considered the property of the partners in trade;<sup>6</sup> and the authority would be implied from the character and scope of the business to enable one partner to bind the firm by such an

<sup>1</sup> *Mann v. Etna Ins. Co.*, 40 Wis. 549; *Baldwin v. Richardson*, 33 Tex. 76; *Shirley v. Fearn*, 33 Miss. 653.

<sup>2</sup> *Pike v. Bacon*, 20 Me. 280; *Cody v. Shepherd*, 11 Pick. 400; *Guinn v. Rooker*, 24 Mo. 290; *Lowery v. Drew*, 18 Tex. 786.

<sup>3</sup> *Person v. Carter*, 8 Murph. 321; *Lucas v. Louder*, 1 McMull. 311; *Lee v. Onstott*, 1 Ark. 206.

<sup>4</sup> *Russell v. Annable*, 109 Mass. 72; *Herbert v. Henrick*, 16 Ala. 581; *Taylor Land. & Ten.* 124 and 125, and cases cited.

<sup>5</sup> *Ante, idem*; *Coles v. Coles*, 15 Johns. 159; *Rohrburg v. Reed*, 57 Mo. 392; *Palmer v. Sawyer*, 114 Mass. 19; *Eaton's Appeal*, 66 Pa. St. 483; *Wilgus v. Lewis*, 8 Mo. App. 386. One partner can convey no specific interest in the firm property. *Tennent v. Gunther*, 31 Mo. App. 429.

<sup>6</sup> *Cox v. McBurney*, 2 Sandf. 561; *Otis v. Sill*, 8 Barb. 102; *Anderson v. Lemon*, 8 N. Y. 236; *Fall River Co. v. Borden*, 10 Cush. 485.



instrument.<sup>1</sup> Nor can one member of a firm execute a valid mortgage of partnership real estate, without the concurrence of the other members of the firm;<sup>2</sup> but as one partner has the implied authority to borrow money, this has been held to be sufficient authority to enable one member of a firm to pledge or mortgage the partnership chattels for the purpose of securing a debt of the firm,<sup>3</sup> and such a mortgage would be binding on the firm, although executed by one partner without the consent of the other members of the firm.<sup>4</sup>

§ 344. Same—Joint and several liability. — According to the common law significance of the term, “joint obligation,” all the obligors were, in legal contemplation, but one person owing a single debt, and no one of them owing any part of it.<sup>5</sup> It was necessary, in the case of joint obligations, to sue all or none, and though any one of several joint obligors could by death avoid the payment of

<sup>1</sup> *Butler v. Stocking*, 8 N. Y. 408; *Grom v. Seton*, 1 Hall, 262; *Lindley Part.* 278 and 279, and cases cited; *Taylor Land & Ten.*, Vol. 1, pp. 127 and 128.

<sup>2</sup> *Lindley Part.*, § 284; *Morris v. Jones*, 4 Horr. 428; *Lambert v. Sharp*, 9 Humph. 224; *Morse v. Bellows*, 7 N. H. 550; *Hart v. Withers*, 2 N. J. L. 285; *Doe v. Tupper*, 12 Miss. 221; *Button v. Hampson*, Wright, 93.

<sup>3</sup> *Ex parte National Bank*, 14 Eq. 509; *Patent Fille Co.*, 6 Ch. 83; *Ex parte Lloyd*, 1 Mont. & Ayr. 494; *Smith v. Andrews*, 49 Ill. 28; *Reid v. Goodwin*, 48 Ga. 527; *Richardson v. Lester*, 83 Ill. 55; *Hawkins v. Hastings Bank*, 1 Dill. 462. For form of partner's acknowledgment for firm, see *Keck v. Fisher*, 58 Mo. 582.

<sup>4</sup> *Woodruff v. King*, 47 Wis. 261; *Morrison v. Mendenhall*, 18 Minn. 282; *McClelland v. Rumsey*, 3 Abb. App., Dec. 74; *Willett v. Stringer*, 17 Abb. Jr. 152; *Gates v. Bennett*, 83 Ark. 311. But the execution of a mortgage of personal property by one partner in his individual name passes no title. *Clark v. Houghton*, 12 Gray, 28.

<sup>5</sup> 1 Chitty's Pl. 8, 9; *Henry v. Mt. Pleasant*, 70 Mo. 520; *Bliss Code Pl.*, §§ 62-92.

a debt,<sup>1</sup> the clemency of the law, in this respect, was more than offset by the corresponding hardship suffered by the surviving obligors, for under the fictitious doctrine of survivorship the obligation which before could only exist as to all the obligors, on the death of one, was by law fastened upon the survivors.<sup>2</sup> This was the universal doctrine applied to all kinds of joint obligations, and the apparent exception to the rule, instead of being one in fact, whereby a dormant partner was relieved from liability, was rather owing to the fact that he was not, in legal contemplation, a real party to the undertaking.<sup>3</sup> But this common law rule, obtaining in the case of joint obligations, together with the ungenerous doctrine of survivorship, has now been abrogated, by statute, in almost all the States which have adopted the civil code, and as such obligations are now by law considered either joint or several, the creditor of a debtor partnership can, generally, at his election, sue either one or all the members of such debtor firm.<sup>4</sup>

§ 345. **Rights and obligations inter sese.**—In the absence of an express agreement to the contrary, the powers of the members of an ordinary mining partnership are in all respects equal, and no one of the copartners has the right to exclude any other member of the firm, from an equal participation in the management of the concern,<sup>5</sup> and this constitutes one of the distinguishing features between

<sup>1</sup> Bliss Code Pl., § 92, and cases cited; Bac. Abr. title "Obligations," d. 4; 1 Par. on Con. and notes, Ch. 2.

<sup>2</sup> Bliss Code Pl., § 92 and note, p. 145; Bac. Abr. title "Obligations," d. 4; 1 Ch. Pl., §§ 41-43, and cases above cited.

<sup>3</sup> Bliss Code Pl., § 92; Chitty's Pl., § 48 and cases cited.

<sup>4</sup> Bliss Code Pl., § 93. See Statutes different States.

<sup>5</sup> Lind. Part. (Vol. II.), § 540; *Rowe v. Wood*, 2 Jac. & W. 558; *Lloyd v. Looring*, 6 Ves. 777; *Smith v. Hill*, 13 Ark. 173; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Marshall v. Coleman*, 2 *Id.* 266.

an ordinary partnership and a corporation, for in the latter the rule is otherwise, and the management of the business is solely in the hands of the directors.<sup>1</sup> But even in the case of a partnership, if the business of the firm is by special agreement vested in the hands of any one or more members of the firm, such members have a perfect right to manage the firm business without the consent of the other members of the firm,<sup>2</sup> and their authority to so act can either be established by direct evidence of such agreement, or implied from circumstances and acquiescence of the other members of the firm.<sup>3</sup> The partner managing the business, however, is under a strict obligation to account to his copartners for his dealings and transactions, and any member of the firm can enforce his right to his share of the profits, by an action for an accounting,<sup>4</sup> and this even though an action for damages could have been maintained.<sup>5</sup>

§ 346. Same — Trust relation arising from. — The partnership relation is one of trust and each member is held

<sup>1</sup> Lindley Part. (Vol. II), § 540; *Burnes v. Pennell*, 2 H. L. C. 520 and 521; *Ang. & Ames on Cor.*, § 221. And such power cannot be taken from directors. *James v. Eve*, L. R. 6 H. L. 335.

<sup>2</sup> *Adionne v. Maxcy*, 13 Mass. 178; *s. c.* 15 *Id.* 39. Majority have a right to control the firm business. *Childers v. Neely* (W. Va.), 34 S. E. Rep. 828.

<sup>3</sup> *Anthony v. Wheatons*, 7 R. I. 49, where it was held competent to show the interest of the managing partner, going to show why such authority should be implied. Authority need not be in writing. *Preston v. Mo. & Pa. Lead Co.*, 51 Mo. 43.

<sup>4</sup> *Lind. Part.*, § 945; *Cruikshank v. M'Vicar*, 8 Beav. 106.

<sup>5</sup> *Wright v. Hunter*, 5 Ves. 792; *Townsend v. Ash*, 3 Atl. 336; *Blain v. Agor*, 1 Sim. 87, and 2 *Id.* 289. And equity in such case will adjust and adjudicate all conflicting rights. *Bracken v. Kennedy*, 3 Scam. 558; *Gillett v. Hull*, 13 Conn. 426; *Niles v. Williams*, 24 Conn. 279; *Hunt v. Gookin*, 6 Vt. 462; *Collyer v. Collyer*, 38 Pa. St. 257; *Stamuens v. M. E. Naughten*, 57 Ala. 278; *Palmer v. Tyler*, 15 Minn. 106; *Harvey v. Bonney*, 98 Mass. 18; *Shepherd v. Boggs*, 2 N. W. Rep. (U. S.) 370; *s. c.* 9 Neb. 257; *Neville v. Moore Min. Co.*, 67 Pac. Rep. 1054 ('90').

to the utmost good faith and fair and open dealing with his copartner.<sup>1</sup> Without his special agreement no partner can charge his associates for his services;<sup>2</sup> no partner can place himself in a position to bias himself against the discharge of his duty to his partners;<sup>3</sup> no member can receive a secret profit or bonus in regard to the firm's property or business,<sup>4</sup> and the purchase of any property the firm is equitably entitled to, would be held in trust for the firm.<sup>5</sup>

§ 347. Same — Right to an account. — No partner is entitled to appropriate more than his share of the partnership mineral, produced from the firm's mines,<sup>6</sup> and if he

<sup>1</sup> *Jennings v. Rickard*, 15 M. M. R. 624; *Bank v. Bissell*, 11 *Idem*, 547.

<sup>2</sup> *Godfrey v. White*, 11 M. M. R. 562. But see, *contra*, *Duff v. McGuire*, 12 M. M. R. 353.

<sup>3</sup> *Burton v. Wookey*, 11 M. M. R. 843.

<sup>4</sup> *Fawcett v. Whitehouse*, 11 M. M. R. 250.

<sup>5</sup> *Settembre v. Putnam*, 11 M. M. R. 425. "Plaintiff and defendant (who was a shopkeeper) entered into partnership in the business of purchasing *lapis calaminaris* from the miners, the defendant being the active purchaser. He changed the purchases from cash transactions into barter, and paid the miners in goods from his store: Held, that his partner had a right to a division of the profits made by the partner in his barter of goods." *Burton v. Wookey*, 6 Madd. 367; M. M. D. 267. "If two or more persons as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them. *Settembre v. Putnam*, 30 Cal. 490; B. & W. L. C. 514; M. M. D. 267. Where a lease is surrendered by partners three months before its expiration and a new lease taken, leaving plaintiff out, his interest continues in the firm under the new lease. *Con. Div. Min. Co. v. Bliley*, 23 Colo. 160; 46 Pac. Rep. 633.

<sup>6</sup> "No demand is necessary as a condition precedent to a suit between partners for an accounting and settlement." *Hanna v. McLaughlin*, 68 N. E. Rep. 475; *Bentley v. Bates*, 4 Y. & C. Eq. Ex. 182; *Roberts v. Eberhardt*, Kay, 158; *Warring v. Crow*, 12 M. M. R. 280.

should do so, the balance of the firm would be entitled to an accounting therefor,<sup>1</sup> without seeking a dissolution of the firm.<sup>2</sup> But partners who have abandoned the enterprise could not compel the abandoned partner to account, for all they would be entitled to would be an account of the money received on the disposition of the land and the rents or profits arising out of the operations conducted.<sup>3</sup>

§ 348. **Same — Right to contribution.** — In case the mining operations result in a loss to the firm, any one partner who has made individual advancements for the firm, is entitled to contribution from his copartners.<sup>4</sup> And if, in the course of the operations, one of the partners becomes indebted and is unable to pay his arrears to the firm, the partners making the advancement are held to have an equitable lien upon his interest for the amounts so due.<sup>5</sup>

§ 349. **Same — In case of dissolution** — Any member of a mining partnership, except those operated on the cost-book principle,<sup>6</sup> can dissolve the partnership at any moment he pleases, provided the duration of the partnership is in-

<sup>1</sup> *Ante, idem*; *Clegg v. Edmondson*, 8 De G., M. & G. 871; *MacSwinney*, pp. 114, 117.

<sup>2</sup> *Bentley v. Bates, supra*. But see, *contra*, *Nisbet v. Nash*, 11 M. M. R. 531.

<sup>3</sup> *Rhea v. Tathens*, 11 M. M. R. 321; *Rhea v. Vannay*, 11 M. M. R. 315. A prospector's contract for a future mining partnership, while still executory, will not give right to an accounting. *Prince v. Lamb*, 128 Cal. 120; 60 Pac. Rep. 689. See chapter, *Accounting*.

<sup>4</sup> *Henderson v. Eason*, 17 Q. B. 701; *Roberts v. Eberhardt, Kay*, 148.

<sup>5</sup> *Fereday v. Wightwick*, 1 R. & My. 45; *Kay v. Johnston*, 21 Beav. 586. "On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern." *Bentley v. Bates*, 4 Y. & C. 182; M. M. D. 271.

<sup>6</sup> *Lees v. Jones*, 3 Jur. (N. S.) 954; *Lind Part.*, Vol. I., § 221.

definite,<sup>1</sup> and the partnership will then continue only for the purpose of winding up the business of the firm.<sup>2</sup> But a notice to dissolve the partnership, to be effectual, must be explicit and communicated to all the partners,<sup>3</sup> and a notice which is in effect a mere proposal to dissolve cannot have such effect;<sup>4</sup> nor can a notice that a partner's share has been forfeited operate as a dissolution of the partnership, for the only thing intended by such a notice is to sever the interest of the partner whose share is forfeited.<sup>5</sup> After the dissolution of a partnership the first thing necessary is to pay the firm debts; secondly, to settle all questions of dispute and accounts be-

<sup>1</sup> *Carlton v. Cummings*, 51 Ind. 478; *Skinner v. Tucker*, 84 Barb. 338; *McElvey v. Lewis*, 76 N. Y. 373; *Lawrence v. Robinson*, 4 Colo. 567; *Pine v. Ornsbee*, 2 Abb. Pr. (N. S.) 375; *MacSwinney Mines*, p. 115.

<sup>2</sup> *Peacock v. Peacock*, 16 Ves. 50. But the partnership must have a continuance, so far as respects the winding up of the concern, until all outstanding engagements are settled. *Brown v. Higginbotham*, 5 Leigh, 583. The causes for a dissolution are briefly summed up by Mr. Lindley in the following classes: (1) The will of one partner: (2) The impossibility of going on, in consequence of (a) the hopeless state of the partnership business, (b) insanity, (c) misconduct. (3) Transfer of a partner's interest. (4) Death. (5) Occurrence of some event rendering continuance of firm illegal. (6) Fraud. *Lindley on Part.*, Vol. I., § 220, p. 283; *Heath v. Samson*, 1 Nev. & Man. 104. "A judgment dissolving a mining partnership, and directing a sale of the partnership property, and a division of the proceeds, is a final judgment." *Clark v. Dunham*, 46 Cal. 205; M. M. D. 272. "Before a final decree can be rendered dissolving a partnership, it is necessary that the assets should be converted into money, and each partner's balance ascertained and allotted to him." *Levi v. Karrick*, 8 Iowa, 150; 13 *Id.* 844; M. M. D. 272. Neither the death, bankruptcy or retirement of a member dissolves a mining partnership. *Thomas v. Hurst*, (Mo.), 73 Fed. Rep. 372.

<sup>3</sup> *Van Soudan v. Moore*, 1 Russ. 463; *Wheeler v. Van Wort*, 9 Sim. 198; *Parsons v. Hayward*, 31 Beav. 199.

<sup>4</sup> *Sanderson v. Milton et al*, 18 Vt. 107; *Hall v. Hall*, 12 Beav. 414.

<sup>5</sup> *Hart v. Clarke*, 6 De G., M. & G. 232.

tween the partners themselves,<sup>1</sup> and thirdly, to divide the remaining assets of the firm between the partners in the proper proportion; or if these are insufficient to pay the debts of the firm, to enforce the proper contribution between the partners for the payment of the firm debts.<sup>2</sup> This can either be done by the partners themselves or their representatives,<sup>3</sup> but in the case of a dispute between the partners, recourse must always be had to a court of equity, for equity alone has jurisdiction to sell and apply the assets of a partnership to satisfactorily adjust the accounts of the different members of the firm and enforce contribution, in case it is necessary to pay the firm debts.<sup>4</sup> For a further discussion of the law on the consequences of a dissolution, with regard to the different members of the firm and the rights of firm creditors, the reader is referred to a special work on the subject of partnership.

**§ 350. Right of assignee to compel accounting. —** When one partner sells his interest in the assets of an unsettled partnership to a third person, and draws an order on his copartner, directing him to pay the assignee any balance due him after settlement of the partnership affairs,

<sup>1</sup> One partner, after a dissolution, has a right to have dissolution notice published. *Traughton v. Hunter*, 18 Beav. 470. But they cannot avoid liability for debts contracted prior to the dissolution. *Lindley Part.*, § 1040, and p. 417 *et sub.* Their liability will continue as to an old customer, for a subsequent debt, unless notice of the dissolution is brought home to him. *Lindley Part.*, p. 415, and § 1040.

<sup>2</sup> *Lindley Part.*, Vol. II., Bk. IV., § 1039, and cases cited.

<sup>3</sup> *Lyons v. Haynes*, 5 Man. & Gr. 505.

<sup>4</sup> *Lindley Part.*, Vol. II., Bk. III., § 945. And where the dissolution is not contested the court will, on motion, decree a dissolution before investigating the conflicting claims of the copartners. *Thorp v. Holdsworth*, 3 Ch. D. 637. A firm is dissolved by sale of all the property. *Dellapienza v. Foley*, 112 Cal. 380; 44 Pac. Rep. 727. Sale by one or more partners does not work a dissolution. *Childers v. Neely* (W. Va.). 34 S. E. Rep. 828.

the assignee is entitled to all the remedies for procuring a settlement, that the original partner would have had against his copartner, if there had been no assignment made, and he can compel an accounting from the drawee, under the assignment, without making his assignor a party to the suit.<sup>1</sup> And as one co-owner can dispose of his interest in a mine, without the consent of his co-owners, an accounting of the profits will ordinarily be directed, although no dissolution is sought by the assignee.<sup>2</sup>

§ 351. **Receivers of mines.** — The power to appoint a receiver in the dissolution of a mining partnership, is discretionary with the court, and, as in the case of other partnerships, the court may either appoint or refuse to appoint a receiver as it deems proper, under the circumstances.<sup>3</sup> If no dissolution or winding up of the partnership is sought, a receiver will not, usually, be appointed.<sup>4</sup> But if the different members of the partnership cannot agree as to the proper mode of operating the mine until it can be sold, or if a dissolution or winding up of the business is sought, the court will generally appoint a receiver and manager to operate the mine.<sup>5</sup> If the

<sup>1</sup> *Atkinson v. Cash*, 79 Ill. 53, where division and allowance to partners was made. *Fawcett v. Whitehouse*, 11 M. M. R. 250; *Bullard v. Kinney*, 11 M. M. R. 348.

<sup>2</sup> *Doll v. Confidence Co.*, 11 M. M. R. 214. *Dures v. Burt*, 28 Cal. 569; *B. & W. L. C.* 489. "An assignee of the interest of a partner (in iron works) not being recognized as a partner by his assignor's associates, does not, by his acceptance of the assignment, incur any liability as between himself and the copartners." *Jefferys v. Smith*, 3 Russ. 158; *M. M. D.*, p. 268.

<sup>3</sup> *Bispham's Prin. Eq.* 510, p. 560; *Kerr on Receivers*, 90-97 (2d Am. Ed.).

<sup>4</sup> *Ante, idem.* Also *MacSwinney on Mines*, p. 113; *Roberts v. Eberhardt, Kay*, 148. Nor will the court appoint a receiver in a doubtful case. *Chicago Co. v. U. S. Co.*, 12 M. M. R. 571.

<sup>5</sup> *Maynard v. Bailey*, 2 Nev. 318; *Shulte v. Hoffman*, 18 Tex. 678;



partner carrying on the business has not been guilty of any misconduct, or is laboring under no other disability, the court would be justified in appointing him receiver, without compensation for his services.<sup>1</sup> But where there are differences between the partners growing out of the alleged misconduct of any member of the firm, it is not proper for the court to appoint any of such members as receiver.<sup>2</sup> After a receiver has been appointed, he becomes an officer of the court and must give security for the proper management of the partnership affairs;<sup>3</sup> he should take possession of the partnership effects and securities, collect and pay the partnership debts, turn over his accounts and balance to the court, and, in general, conduct the winding up of the business with the same degree of skill and caution as he would do, if engaged in a settlement of his own affairs.<sup>4</sup>

§ 352. *Laches in mining partnerships.* — The doctrine of laches is applied to all kinds of cases where the party applying for relief has himself been guilty of gross neglect, and equity makes no distinctions in refusing its relief on account of such conduct.<sup>5</sup> The doctrine is especially applicable to mining transactions and others of a speculative nature, where every new move is necessarily accompanied by a certain amount of risk, and where time is such an

*Boyce v. Burchard*, 21 Ga. 74; *Miller v. Jones*, 39 Ill. 54; *Clegg v. Fishwick*, 1 M. & G. 294; *MacSwinney Mines*, p. 115.

<sup>1</sup> *Lindley Part.*, §§ 555 and 557. The duty of liquidation may devolve on a member of the firm either by agreement or operation of law. *Bisp. Prin. Eq.*, § 510, p. 560.

<sup>2</sup> *Bisp. Prin. Eq.*, *supra*.

<sup>3</sup> *Kerr on Receivers*, Chap. VI. (2d Am. Ed.); *Bisp.*, § 579.

<sup>4</sup> *Kerr on Rec.*, *supra*. *Wilmington Min. Co. v. Allen*, 9 M. M. R. 106. He is a mere custodian and has only such powers as are conferred by the court. *Bisp. Prin. Eq.* 579-580.

<sup>5</sup> *Bispham's Prin. Eq.*, § 260, p. 324. A party may also lose his right to complain of fraud by delay. *Ante*; *Roth v. Vanderlyn*, 44 Mich. 597.

important element in every undertaking.<sup>1</sup> Accordingly, it has been held that where one of several persons, who have agreed to become partners, unfairly leaves the others to perform the work and then comes forward to claim a share in the profits, the courts would not assist him to obtain a share of the gains, after he had remained quiet to avoid responsibility in case of a loss.<sup>2</sup> In disputes, therefore, between mining partners, each should be careful to assert his claims while the dispute is still fresh; for if one stands by without asserting his claims, until the mine has been rendered prosperous by his copartners' activity, and then comes forward to claim his part of the profits, he will be refused redress on the ground that he has applied too late.<sup>3</sup>

<sup>1</sup> Fry Spec. Per. of Con., 416-418; Blanchard & Weeks Ld. Cas., p. 397; Earnest v. Vivian, L. J. Ch. (N. S.) 513; Walker v. Jeffries, 11 L. J. Ch. (N. S.) 209; Pollard v. Clayton, 1 Kay & J. 462.

<sup>2</sup> A period of nine years has been held to bar the rights of a copartner to an accounting and a share of the proceeds from a lease renewed in the name of an individual member. Clegg v. Edmondson, L. J. Ch. (N. S.) 673; B. & W. L. C. 569.

<sup>3</sup> See Slemmer's Appeal, 58 Pa. St. 169; Mor. Min. Dig., p. 270. But what would be considered an unreasonable time for waiting to claim relief is largely in the discretion of the court and would be determined by the chancellor according to the facts in the case before him. Bispham's Prin. Eq., § 260; MacSwiney, p. 120; Clark v. Hart, 6 H. L. Cas. 633; Rule v. Jewell, 18 Ch. D. 660. "The case of mines has always been considered by a court of equity as a peculiar one. The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore, where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary, determining that they will intervene only in case the mine should turn out prosperous, but determining to hold off if a different state of things should exist, courts of equity have said that those are parties who are to receive no encouragement; that if they come to the court for relief, its doors shall be closed against them; that their conduct being inequitable, they have no right to equitable relief." Clarke v. Hart, H. L. Cas. 655; Hart v. Clarke, 19 Beav. 349; 6 De G., M. & G. 232; M. M. D. 160.

## CHAPTER XXII.

### JOINT-STOCK MINING COMPANIES.

#### SECTION 353. General nature and definition.

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- 366. Judgments and executions against.
- 367. Dissolution of company.

§ 353. General nature and definition. — A joint-stock company is an association of persons, whose capital is thrown into one mass and employed for the general purposes for which the company was organized, every member sharing the losses and gains according to the proportion of capital that he has invested.<sup>1</sup> Joint-stock companies are much more common in England than in the United States, and on account of the difficulty and expense attending incorporation there, numerous statutes have been enacted, requiring certain formalities to be observed in the organization.<sup>2</sup> In the United States, however, all companies not organized under special or general law of the legis-

<sup>1</sup> 3 Kent's Comm. 262; Wait's Act. & Def., Vol. IV., p. 159.

<sup>2</sup> 6 Geo. 4, c. 91, § 2; 4 & 5 Wm. 4, c. 94; 7 Wm. 4 & 1 Vict., c. 73; 7 & 8 Vict., c. 111-113; and for table of English Sts. see Lindley on Part., Vol. I., § 11; 25 & 26 Vict., Ch. 47.

lature, are regarded as ordinary partnerships;<sup>1</sup> the rules of law respecting them are the same, and aside from the rules and by-laws governing the election of officers and the transaction of the company's business,<sup>2</sup> the only thing necessary to entitle one to the rights of membership and subject him to the consequent liabilities is the subscription of his name to the articles of association and the payment of his portion of the stock.<sup>3</sup> But joint-stock companies differ from ordinary partnerships, in that they are aggregate bodies,<sup>4</sup> and from corporations principally, on account of the individual liability of the different members.<sup>5</sup> However, they partake largely of the essentials of both partnerships and corporations, and are rather an association of persons whose legal status is intermediate between the two.<sup>6</sup>

<sup>1</sup> *Robbins v. Butler*, 24 Ill. 397; *Bullard v. Kinney*, 10 Cal. 60; *Wells v. Gates*, 18 Barb. 557; *Butterfield v. Beardsley*, 28 Mich. 412; *Cox v. Bodfish*, 35 Me. 302; *Moore v. Brink*, 6 Thomp. & C. 22; *Wait's Act. & Def.*, Vol. 4, pp. 159 and 160; *Lindley Part.*, Vol. I., pp. 6 and 7. Joint-stock companies were entirely unknown to the English common law, and companies neither partnerships nor corporations were formerly regarded as nuisances. *McIntire v. Connell*, 1 Sim. (N. S.) 233. See *Bubble Act*, 6 Geo. 1, c. 18. Repealed in 1825, 6 Geo. 4, c. 91; and for history of joint-stock companies see *Lindley on Part.*, Vol. I., Sec. 6 *et sub.* A share in a joint-stock company is not the equivalent of a corresponding sum of money, but is such, subject to the rights and duties of the other members and third parties in regard to such share. *Borland's Tr. v. Steele*, 70 L. J. Ch. 51; *Hogg v. Hoag*, 107 Fed. Rep. 807 (1901).

<sup>2</sup> *Pars. on Part.*, 542; *Wait's Act. & Def.*, p. 160 and cases cited.

<sup>3</sup> *Dennis v. Kennedy*, 19 Barb. 517; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Wait's Act. & Def.*, p. 160.

<sup>4</sup> *Lindley on Part.*, § 6, Vol. I., and cases cited.

<sup>5</sup> *Wait's Act. & Def.*, Vol. 4, p. 159, and cases cited.

<sup>6</sup> *Ante, idem*; *Oliver v. Liverpool &c. Ins. Co.*, 100 Mass. 531, 539; *McIntire v. Connell*, 1 Sim. (N. S.) 233, and cases cited; *Lindley on Part.*, Vol. I., p. 7 and following.

§ 354. **Companies organized under statute.** — The legal status of joint-stock companies organized under statute, is similar, in some respects, to that of corporations, and under some of the State statutes they are regarded as essentially the same,<sup>1</sup> and this is perhaps the uniform rule, when the company is organized with a fixed capital,<sup>2</sup> but as some of the State statutes provide for the organization of such companies without a fixed capital, as they are, where organized under such statutes, quite different from corporations,<sup>3</sup> a separate discussion of their peculiarities is not deemed out of place. As to the method of organization, under statute, it is not usually necessary that there should be any subscription in writing by its members, in order to constitute a joint-stock mining company,<sup>4</sup> and although it is to last for a longer time than one year from the date of its creation, it is not within the statute of frauds.<sup>5</sup> A person may be a stockholder, even though there has been no certificate of stock given him,<sup>6</sup> and he may be liable to the duties of membership although he has not been formally declared a stockholder, and in order to

<sup>1</sup> N. Y. Laws 1881, Ch. 599; 25-26 Vict., Ch. 89; Shelford on J. S. Cos. 7, 8; Thomas v. Dokin, 22 Wend. 9, 108; Morawetz on Cor., § 18; Beach, §§ 7, 167.

<sup>2</sup> If the statute confers corporate franchises the company will be held a corporation although the statute provides to the contrary. Beach on Pri. Cor., § 7; Warner v. Beers, 23 Wend. 108.

<sup>3</sup> *Ante, idem*; See Pa. Act 1874, p. 271; N. Y. Laws 1867, Ch. 289; Va. Laws 1883, Ch. 97; Deering's Civil Code Col. 2511; Stat. Wis. 1878, § 3210.

<sup>4</sup> Lindley on Part. 12, 49; Boone on Cor., § 337. And where a subscription is signed it is executory only and those who meet could not bind the others. Hedge & Horn's App., 63 Pa. St. 273; B. & W. L. C. 556; Nat. Bank v. Van Dermerker, 74 N. Y. 234.

<sup>5</sup> Lindley on Part., *supra*; Blan. & Weeks Ld. Cas. 556 *et seq.*

<sup>6</sup> Lindley on Part., §§ 12 and 13; Farrar v. Walker, 8 Dill. 506, note; Boone Cor., § 337.

entitle one to the privileges of a member, all that is necessary is for him to sign the articles of association.<sup>1</sup>

§ 355. **Member bound by company's rules.** — The privilege of membership in a joint-stock company, being created solely by the association itself, there is no way whereby an applicant for membership can compel admission into the company and the courts will not interfere unless a clear case of injustice is shown, to restore a member who has been deprived of his membership, for a non-compliance with the conditions on which membership is made to depend.<sup>2</sup> And persons who have become members of a joint-stock company are bound by the company's rules unless they are in conflict with the law of the land, and courts will only interfere to hold the company to a fair and honest administration of its rules.<sup>3</sup> Equity, however, will take cognizance of and enforce the rules and regulations of such companies within the line of order and common justice, and to correct abuses, and a member is not bound by an exercise of power on the part of his fellow members to which he has not assented and which is unreasonable or not derived from the laws of the land.<sup>4</sup>

<sup>1</sup> *Wells v. Bates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517; *Waburn v. Inglilly*, 1 Myl. & K. 61. For Virginia Statutes, see Code, § 1145, construed in *Coaltner v. Bargamin*, 37 S. E. Rep. 779 (1901). Partnership law, held to apply to a joint-stock company, in *Bullard v. Kinney*, 11 M. M. R. 848.

<sup>2</sup> *Burton v. St. George's Society*, 28 Mich. 261; *White v. Bronell*, 4 Abb. (N. S.), 162; *s. c.* 2 Daly, 329; affirming *s. c.* 3 Abb. (N. S.) 318; *Ollney v. Brown*, 51 How. 92. But, *contra*, see *Leech v. Harris*, 2 Brewst. (Penn.) 571.

<sup>3</sup> *Ollney v. Brown*, 51 How. 92.

<sup>4</sup> *Ante, idem.* *Santa Clare Mining Assn. v. Quicksilver Min. Co.*, 17 Fed. Rep. 657; *Higgins v. Armstrong*, 9 Colo. 38; *Lamor v. Hale*, 79 Va. 147.

§ 356. **Individual liability of members.** — The members of a joint-stock company organized for the purpose of carrying on mining operations are liable to third parties, the same as partners, unless the company is incorporated for the full amount of the indebtedness of the company.<sup>1</sup> The following propositions were laid down in a leading case,<sup>2</sup> as the law governing the individual liabilities of members who had subscribed to the articles of association, and their responsibility for the acts of the company's agents in purchasing materials necessary for the association: 1. That the subscribers were liable for the full amount of the debt incurred the same as partners. 2. That the acts of the two agents bound the members; and that the concurrence of the members, if it were necessary, where the contrary did not appear, would be presumed. And the members of the company would be liable for goods furnished on the order of the company's agents, if the same were furnished with their concurrence and approbation.<sup>3</sup> And they would likewise be liable, even after the incorporation of the company, for debts incurred by the

<sup>1</sup> *Pipe v. Bateman*, 1 Iowa, 369; *Keosley v. Codd*, 2 Cor. & P. 408; *Tappan v. Bailey*, 4 Metc. (Mass.) 535; *Moore v. Brink*, 4 Hun (N. Y.), 402; 6 N. Y. Sup. (T. & C.) 22; *Lewis v. Fulton*, 64 Iowa, 220; *Heath v. Goslin*, 80 Mo. 310.

<sup>2</sup> *Wells v. Gates*, 18 Barb. 554. "The members of an unincorporated joint-stock association, engaged in boring for oil, sustained by money advanced by each, may in a proceeding for the distribution of a common fund be treated as partners." *Butterfield v. Beardsley*, 28 Mich. 413; M. M. D. 253. As to liability of members for debts of company, see *Kirkpatrick v. Baselo*, 116 Mich. 657; *Martin v. Land Co.*, 97 Va. 349. In Missouri, joint-stock members are liable for debts as copartners; but a member cannot sue another without dissolution. *Laney v. Fickle*, 83 Mo. App. 60. See also *Raymond v. Colton*, 104 Fed. Rep. 219.

<sup>3</sup> *Ridgely v. Dobson*, 3 Watt. & Serg. 108; *Robinson v. Robinson*, 1 Me. 240; *Tredendale v. Taylor*, 23 Wis. 538; *Walt's Act. & Def.*, Vol. IV., p. 16.

company, prior to the act of incorporation.<sup>1</sup> But a member is not individually liable for a debt incurred by the company, before he became a member of the company, unless he voluntarily assumes such liability,<sup>2</sup> and an assessment against a member for such a debt could not be enforced against him by the company.<sup>3</sup>

§ 357. *Member deriving secret benefit.* — In the above and preceding section we have examined into the liability of members of a joint-stock company as to third persons. There are reciprocal rights and duties existing between the company and its members and the individual members of the company, which if infringed upon would subject the wrong-doer to corresponding liability, and chief among these rights, is the right of the company and its members, to receive all profit and gain resulting mediately or immediately from the property of the company.<sup>4</sup> The members of such a company enter into the same for their mutual benefit; each member has a right to expect and demand from his associates good faith in all that relates to their common interests,<sup>5</sup>

<sup>1</sup> *Hoslett v. Witherspoon*, 1 Strobb. (L. C.) Eq. 209; *Goddard v. Pratt*, 16 Pick. 412; *Witmer v. Schlatter*, 2 Rawle, 359.

<sup>2</sup> *Barry v. Nicholls*, 2 Humph. (Tenn.) 324; *Lake v. Munford*, 12 Miss. 312.

<sup>3</sup> *Richmond &c. Assn. v. Clarke*, 61 Me. 351. Where the property is vested in trustees, who are given no power to bind the members personally, a person who takes a note which refers to such want of authority cannot hold the members individually liable. *Bank of Topeka v. Eaton*, 107 Fed. Rep. 1003 (1901).

<sup>4</sup> *Penfield v. Skinner*, 11 U. S. 296; *Bennett v. Wheeler*, 12 La. 763; *Koehler v. Brown*, 2 Daly (N. Y.), 78; s. c. 31 How. 235; *Lizer v. Daniels*, 66 Barb. 426.

<sup>5</sup> *Wait's Act. & Def.*, Vol. 4, p. 161; *Getty v. Delvin*, 54 N. Y. (9 Sick.) 403. "Where the articles of a joint-stock association provided for an assessment, upon this, among other conditions, that the proceeds of sale of two hundred non-assessable shares should have been first ex-



and no member of the company is permitted to derive a secret and separate advantage to the prejudice of the other members.<sup>1</sup> And if one member of the company, unknown to his associates, transfers property which he had purchased to the company, at a greater price than that paid by him for the same, he is not entitled to the profits accruing thereon, but they should be distributed between the different members of the company.<sup>2</sup> But in the organization of companies it is perfectly legitimate for members to contribute, as assets of the company, property held by themselves, at any price agreed to be paid therefor by the company, and the owners of property, either real or personal, may form a partnership or association, and sell such property to the association, at any price, provided the transaction is not tinged with fraud.<sup>3</sup>

§ 358. **Rights and duties of officers.** — Where, by the articles of agreement of a joint stock company, the property of the company is to vest in certain managers or trustees, elected by the members, and it is provided in the

pending, a notice given while fifty of such shares still remained unsold calling for a meeting for the purpose of levying such assessment, was premature and invalid, and is not aided by the fact that between the time of the notice and the time of the meeting such fifty shares had been sold as required by the conditions in the articles of association." *Westcott v. Minnesota M. Co.*, 28 Mich. 145; M. M. D. 158. "A mining partner (or associate) may buy in the interest of a cotenant at sheriff's sale with his own funds in the absence of any circumstances of fraud or trust, and the rule governing the relation of trustees and guardians does not apply to such case." *Bradbury v. Barnes*, 19 Cal. 120; M. M. D. 268.

<sup>1</sup> *Ante, idem.* *Burton v. Weekey*, 11 M. M. R. 342; *Fawcett v. Whitehouse*, 11 M. M. R. 250.

<sup>2</sup> *Ante, idem.* *Secor v. Lord*, 3 Keyes (N. Y.), 525; s. c. 4 Abb. Ct. App. 188.

<sup>3</sup> *Densmore Oil Co. v. Densmore*, 64 Penn. St. 43; *Wait's Act. & Def. Vol. IV.*, p. 162; *Bispham Prin. Eq.* 238.

articles of association that the members shall pay the amount of their respective subscriptions to such trustees, the latter can collect the amount subscribed, by an action, if necessary, in their own names,<sup>1</sup> although it would be otherwise, unless the articles contained an express promise on the part of the subscribers to pay the amount of their respective subscriptions to the trustees.<sup>2</sup> All the officers and agents of a joint-stock company stand in the relation of trustees to the stockholders, being responsible to their *cestuis que trust*, for all gain and profit that accrues to them in the discharge of their official duties.<sup>3</sup> They are not individually liable for the debts of the association, unless they have in some way rendered themselves specially liable,<sup>4</sup> and although managers of a joint-stock company, appointed to conduct the affairs of the company and protect the interests of the parties joined, are personally liable for neglect or fraud, in the discharge of their official duties, the stockholders of such company, particularly where it is organized under statute, stand to each other in the relation of co-owners of the property managed, and are not individually responsible for the acts of their managers.<sup>5</sup>

<sup>1</sup> Cross v. Jackson, 5 Hill (N. Y.), 478.

<sup>2</sup> *Ante, idem.* Coal Co. v. Fry, 4 Phil. (Penn.) 129; Bullard v. Kinney, 10 Cal. 60; Perring v. Hane, 4 Bing. 28; Holmes v. Higgins, 1 B. & C. 74; Ewing v. Needlock, 5 Port. (Ala.) 82.

<sup>3</sup> Coal Co. v. Fry, 5 Phil. (Penn.) 129.

<sup>4</sup> Wolf v. Schlieffer, 2 Brewst. (Penn.) 563; Fredenholl v. Taylor, 28 Wis. 538; Siger v. Daniels, 66 Barb. 426. Managers are specially liable for expenses resulting from unauthorized acts. Held so in the case of a land company, and this, even though the expense enhanced the value of the company's land. McKinley v. Irwin, 13 Ala. 681. Also Crum's App., 66. Penn. St. 474.

<sup>5</sup> Boodey v. Drew, 46 How. (N. Y.) 459; s. c. 2 N. Y. Sup. (T. & C.) 69.

§ 359. **Same — Misconduct of trustees or managers.**— Occupying a fiduciary position with relation to its members, the managers and directors of a joint-stock company can derive no profit or gain at the expense of the parties whose interest they are bound to protect, without the fullest and most complete disclosure, and any gain they may reap in the discharge of their official duties they must account for to the company.<sup>1</sup> Managers and directors are individually liable to the company they represent for any damage resulting from their neglect or fraud in the discharge of their official duties,<sup>2</sup> and if their misconduct is of such a nature as to impair the credit of the company, or seriously injure the interests of its members, a court of equity would prevent a repetition of the offense by injunction, and if necessary remove the guilty officer.<sup>3</sup> But it is no ground for a dissolution or the appointment of a receiver that the manager or officers of a joint-stock company have been guilty of misconduct or infidelity. The court will generally only go so far as to enjoin or prevent the misconduct by a removal of the objectionable officer, and a dissolution would only be decreed on the unanimous consent of all the shareholders, and it must be specially prayed for if such consent cannot be had.<sup>4</sup>

<sup>1</sup> *Coal Company v. Fry*, 5 Phil. (Penn.) 129.

<sup>2</sup> *Boodey v. Drew*, 46 How. (N. Y.) 459; *s. c.* 2 N. Y. Sup. (T. & C.) 69.

<sup>3</sup> *Blsp. Prin. Eq.* 428, 465. Members of a joint-stock company are not personally liable for the fraud of the secretary in putting in effect bogus issues of shares. *Dixon v. Kenneway*, 69 L. J. Ch. 501 (1901).

<sup>4</sup> *MacSwinney Mines*, p. 116; *Blsp. Prin. Eq.*, §§ 508, 509. No dissolution would be decreed at the instance of a minority of the members, unless equitably entitled to it. *Hinkle v. Belthew*, 78 Me. 221. But if impracticable to keep the company together, because of the failure of the enterprise, a dissolution would be ordered. *Von Schmidt v. Huntingdon*, 1 Cal. 55. Or if the business has been suspended and the enterprise abandoned. *Burk v. Roper*, 72 Ala. 138; *Billington v. Steel Co.*, 9 Atl. Rep. 35.

§ 360. **Contracts of joint-stock companies.** — A joint-stock company can contract and be contracted with the same as an ordinary partnership or corporation, in the manner provided by the articles of association or by-laws, but the individual liability of members of the company is the same as that of ordinary partners.<sup>1</sup> A part only, of the members of a company, have no right to bind the other members of the company on contracts, and the company will in no case be liable on an unauthorized executory contract, without a subsequent ratification by a majority of the members, or the number provided for to make a valid contract for the company.<sup>2</sup> There are certain cases in which the company can be bound on an implied contract, as where the act done was necessary, or in furtherance of the objects for which the company was organized, but when such is not the case a prior authority or subsequent ratification must be proved.<sup>3</sup> And the subsequent ratification of an unauthorized contract must be of as high authority as the original power, to authorize the making of a valid contract, so where the president and other members of a company purchased property for the company, without authority, a ratification of such unauthorized contract by the managers of the company, who had no authority to borrow money, or increase the capital, was held to be insufficient to bind the members.<sup>4</sup> But evidence of the custom of a company, as to its established and uniform manner of doing business, is held to be admissible to charge the company with an acquiescence or consent to a departure from its by-laws or the prescribed manner for making contracts, and where

<sup>1</sup> *Dow v. Moore*, 47 N. H. 419. And is liable on a *quantum meruit* for work. *Sullivan v. Campbell*, 2 Hall (N. Y.), 271.

<sup>2</sup> *Sizer v. Daniels*, 66 Barb. 426.

<sup>3</sup> *Ante, idem.* *Walt's Act. & Def.*, Vol. 4, p. 165.

<sup>4</sup> *Crum's Appeal*, 66 Penn St. 474.

such custom is fairly established, the company's agents would not be held individually liable on a contract in disregard of the company's rules, if such contract was subsequently ratified by the members of the company, unless it could be directly traced to the negligence of the company's agents.<sup>1</sup>

§ 361. **Company property and assets.**—There is no legal impediment to vesting the title to property in an unincorporated joint-stock company;<sup>2</sup> the company can acquire title to money paid upon subscriptions to capital stock, and it has been held that the capital stock and property of the company may consist of contributions of any kind of property other than money.<sup>3</sup> The property of joint-stock companies consists principally of the following elements, *i. e.*, (1) The capital stock, (2) the property and assets of the company, (3) the franchise, and (4) the stock of the individual shareholders.<sup>4</sup> The managers of a company, appointed by a majority of the members

<sup>1</sup> *Henry v. Jackson*, 37 Vt. 431; *Dow v. Moore*, 47 N. H. 419. "A mining company, unincorporated, consisting of eleven members, formed a partnership with one Davis, for trading purposes, the company and Davis each advancing half the capital. One of the mining company acted as salesman in the store; two other of its members attended to the business for the mining company: *Held*, that each member of the mining company was a member of the trading firm; 2. That the particular party who acted as salesman was by no means a dormant partner, and upon the facts of the case, his note bound the firm." *Rich v. Davis*, 6 Cal. 163; M. M. D. 269.

<sup>2</sup> *Walt's Act. & Def.*, Vol. 5, p. 164, § 7; *American Silk Works v. Soloman*, 6 N. Y. Sup. (T. & C.) 362; *s. c.* 4 Hun, 135.

<sup>3</sup> *Ante, idem.* *Boynton v. Hatch*, 47 N. Y. (2 Sick.) 225.

<sup>4</sup> *Louisville &c. Co. v. State*, 8 Heisk. (Tenn.) 663, 795. "The shareholders in a ditch may be regarded as partners entitled to participate in the profits derived from the business of carrying on a ditch, where such profits consist in sales of water from the ditch. *Abel v. Love*, 17 Cal. 238; M. M. D. 259.

present at a regular meeting, have a perfect right to appropriate the funds and assets of such company placed under their control, for any purpose within the scope of the general object of the company's business, for which they have been raised,<sup>1</sup> and in case the company should afterwards become incorporated, no formal transfer of the property of the joint-stock company is necessary, upon the formation of the corporation, if such property was acquired for the purpose of forming a corporation and the members of the company have agreed that it shall form a part of the corporate assets when formed.<sup>2</sup> But the funds and assets of a joint-stock company can only be applied to further the general purpose for which they were contributed, and the trustees or managers have no right to divert the funds from those purposes, without the consent or authority of the members of the company, and they cannot, upon any pretense, apply the company's funds for purposes beyond the general scope of the company's business.<sup>3</sup>

§ 362. *Same — Right to hold real estate.* — It is perfectly competent for an unincorporated joint-stock company to acquire and hold the title to real estate, and the members of the same, like an ordinary partnership, are tenants in common in the land.<sup>4</sup> It was said in an early case that the right of such an association to hold real estate could only be questioned by the people.<sup>5</sup> However,

<sup>1</sup> *Walt's Act. & Def.*, Vol. 4, p. 163, § 7; *Abels v. McKean*, 10 N. J. Eq. 462.

<sup>2</sup> *Abels v. McKean*, 18 N. J. Eq. 462; *Boynton v. Hatch*, 47 N. Y. (2 Sick.) 225; *Amer. Silk Works v. Solomon*, 6 N. Y. Sup. (T. & C.) 353.

<sup>3</sup> *Morton v. Smith*, 5 Bush (Ky.), 467; *Abels v. McKean*, 18 N. J. Eq. 462.

<sup>4</sup> *Wright v. Putnam*, 2 *Thomp. & Cook*, 455. See, as to wife's dower in land so held, *Nicoll v. Ogden*, 29 Ill. 323.

<sup>5</sup> *Howell v. Earp*, 21 Hun, 393.

it has frequently been claimed that a voluntary unincorporated association has not legal capacity to receive a donation, although a valid bequest to such an association could be made to take effect indirectly; <sup>1</sup> but however this may be, it is of no consequence, in the settlement of the affairs of a joint-stock company, as affecting the rights of the associates entitled to an interest therein, that the legal title to land belonging to the company has been taken in the name of one or more of the associates, or in a third person, the members of the company are still entitled to their beneficial interest in such land.<sup>2</sup>

§ 363. **Consolidation of different companies.**— There is no legal impediment to the union or consolidation of two or more joint-stock companies, and a consolidation can be accomplished in any manner agreed upon between the stockholders of the different companies.<sup>3</sup> The individual members remain liable for the debts of their respective companies, contracted prior to the consolidation,<sup>4</sup> but no formal transfer of the joint property is necessary, provided the members agree that it shall belong to the new association, when formed.<sup>5</sup> Where there is a clause in the articles of association, forbidding the union or consolidation of a given company with any other, without the consent of a majority of the stockholders, but there is a

<sup>1</sup> *Green v. Allen*, 5 Humph. (Tenn.) 168, 170; *White v. Howard*, 46 N. Y. (1 Sick.) 144; *Cahill v. Bigger*, 8 B. Monr. (Ky.) 211; *Smith v. Nelson*, 18 Vt. 511, 546; *Gibson v. McCall*, 1 Rich. 174.

<sup>2</sup> *Barker v. White*, 58 N. Y. 204; *Butterfield v. Beardsley*, 28 Mich. 412.

<sup>3</sup> *Boone on Cor.*, § 185; *Black v. Del. & C. Canal Co.*, 24 N. J. Eq. 455.

<sup>4</sup> *Haslett v. Witherspoon*, 1 Strabh. (S. C.) Eq. 209; *Godard v. Pratt*, 16 Pick. 412; *Witmer v. Schlatter*, 2 Rawle, 359.

<sup>5</sup> *Walt's Act. & Def.*, Vol. 4, p. 164, § 7; *Amer. Silk Works v. Solomon*, 6 N. Y. Sup. (T. & C. 352) s. c. 4 Hun, 135.

clause providing for an amendment of the articles of association by a concurrent vote of two-thirds of the executive committee and a majority of the trustees, the authority to amend the articles gives no power to take from the stockholders the power to prevent the consolidation of the company with any other, for they reserved this power for their own protection and such authority is only intended for such amendments as are pertinent to the objects of the business which the company was organized to carry on.<sup>1</sup> Where a consolidation is sought for, a dissenting shareholder need not surrender his interest in the property at an estimated valuation; he can have the value of his interest ascertained by a sale.<sup>2</sup> But a dissenting stockholder is not entitled to have a sale at the commencement of the litigation; his right is to have it sold when he has recovered judgment, and where the amount of dissenting stock is small in proportion to the amount of stock whose owners acquiesce in the agreement for consolidation, the court will have the consolidated company give bond for the satisfaction of the judgment for the value of the property transferred to it belonging to the dissenting shareholder.<sup>3</sup>

§ 364. **Parties to actions by and against.** — In all actions at law by and against an unincorporated mining association, as it occupies the same legal status as an ordinary partnership, the suit should be brought in the name of all the members, or in the name of one or more, for the use

<sup>1</sup> *Boone on Cor.*, § 186; *Black v. Del. &c. Co.*, 24 N. J. Eq. 455.

<sup>2</sup> All stockholders must consent to consolidation and those dissenting cannot be compelled. *Black v. Del. &c. Canal Co.*, *supra*; *Kean v. Johnson*, 40 N. J. Eq. 401.

<sup>3</sup> *Black v. Del. &c. Co.*, *supra*.



of all,<sup>1</sup> and no action can be maintained by or against the association in the character of a society possessing corporate rights, *i. e.*, in the name of any one or more of the officers of the association, unless it is organized under some statute, whereby such authority is given.<sup>2</sup> In actions by or against companies organized under statute, however, it is not necessary that the individuals comprising the company should be made parties, except such as are authorized by the statute to represent the company,<sup>3</sup> but the action is not properly brought against a greater or less number than the statute provides for, and under a statute authorizing the president and secretary to represent the company, an action against the president, secretary and treasurer is not properly instituted.<sup>4</sup> The complaint, in actions against companies organized under statute, should show that the company is a joint-stock company or association, consisting of the requisite number of members,<sup>5</sup> but the names of the shareholders need not be stated and the

<sup>1</sup> *Pipe v. Bateman*, 1 Iowa, 369; *Birmingham v. Gallagher*, 42 Mass. 190; *Cockburn v. Thompson*, 16 Ves. 321; *Gorman v. Russell*, 14 Cal. 531.

<sup>2</sup> *Sta. & N. Y. Laws*, 1881, Ch. 599; *Statutes different States*; *Pipe v. Bateman*, 1 Iowa, 369; *Birmingham v. Gallagher*, 112 Mass. 190; *Cockburn v. Thompson*, 16 Ves. 321; *Gorman v. Russell*, 14 Cal. 531.

<sup>3</sup> *Alery v. Brown*, 51 How. (N. Y.) 92; *Walt's Act & Def.*, Vol. IV., p. 168.

<sup>4</sup> *Ante, idem.* *Schmidt v. Gunther*, 5 Daly (N. Y.), 452. "Plaintiff and defendant were shareholders in a joint-stock mining company. Money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of £500, which they consented to make on the security of the joint promissory note of the plaintiff, defendant and T. The note was given and the money advanced, and applied to the purposes of the mine. The plaintiff, having been compelled to pay more than his share of the note, sued the defendant for contribution: *Held*, that this was not a partnership transaction, and therefore that the action was maintainable." *Sedgwick v. Daniel*, 2 H. & N. 819; *M. M. D.* 263.

<sup>5</sup> *Lindley on Part.*, 49 and note.

existence of the company, under the statute, need not be alleged or proved, when the court takes cognizance of the laws by which it was created.<sup>1</sup>

§ 365. *Same — Actions between company and members.* — In the absence of provisions in the by-laws or articles of association, regulating the remedies of members as between themselves and the company, the general law of partnership applies,<sup>2</sup> and a member cannot in general maintain an action against the company on a contract between himself and the company<sup>3</sup> for services rendered in the conduct of the business of the company,<sup>4</sup> or maintain any action against the company or a member that would involve an examination of the partnership accounts.<sup>5</sup> But the member of a joint-stock company, like the member of an ordinary partnership, may recover from the company, for expenses or services rendered previous to his having become a member of the company,<sup>6</sup> and in the case of companies organized under statute, it is no valid objection to an action against the company, in the manner prescribed by statute, that the plaintiffs are members of the company.<sup>7</sup> If the articles of association or by-laws provide that certain officers can prosecute, in an action at law, all assessments upon the shares of stock, an action therefor can be maintained in the name of such officers of the company

<sup>1</sup> *Ante, idem.*

<sup>2</sup> *Bullard v. Kinney*, 10 Cal. 60; *Wait's Act. & Def.*, Vol. 4, p. 167.

<sup>3</sup> *Ante, idem.* *Wilson v. Curgan*, 15 Mees. & W. 532; *Perring v. Hane*,

<sup>4</sup> *Bing*, 28; *Holmes v. Higgins*, 1 B. & C. 74.

<sup>5</sup> *Coal Co. v. Fry*, 4 Phil. (Penn.) 129.

<sup>6</sup> *Wilson v. Curzo*, 15 Mees. & W. 532.

<sup>7</sup> *Lucas v. Beach*, 1 Man. & G. 417; *Wait's Act. & Def.*, Vol. IV., p. 168.

<sup>8</sup> *Lindley on Part.* 49; *Waterbury v. Merchants &c. Co.*, 50 Barb. (N. Y.) 167; *Fargo v. McVicker*, 55 Barb. 437; *Hinkle v. Blethew*, 78 Mc. 221; *Olery v. Brown*, 51 How. (N. Y.) 92.

in the manner prescribed by statute, and it would not be a good defense that in actions between themselves, the rule does not differ from that which prevails between the members of an ordinary partnership.<sup>1</sup>

§ 366. **Judgments and executions against.** — Under the statute permitting actions to be brought against joint-stock companies by proceedings against certain officers of the company, a judgment would bind only the joint property of the association and not the individual property of the members so sued, for they are sued in their representative capacity, as officers of the company and not as individuals.<sup>2</sup> Before the president and members of the company could be held individually liable on a judgment against the company, the execution against the company must have failed to secure a satisfaction of the debt.<sup>3</sup> But the liability of the individual members of a joint-stock company and judgment against the company, after execution returned unsatisfied, is the same as that of partners, and consists in the original demand against the company, and not the judgment against it. The complaint, therefore, should allege a subsisting cause of action against the company on the original demand.<sup>4</sup>

<sup>1</sup> Lindley on Part., *supra*. But a minority of the members could not procure a receiver and sale of the property without a clear case of fraud, or imposition by the majority. *Hinkle v. Blethew*, 78 Me. 221. Where the president of a joint-stock company surreptitiously transferred the property, members are entitled to an accounting. *Boothe v. Dodge* (1901), 69 N. Y. Su. 673.

<sup>2</sup> *National Bank of Schuylerville v. Van Derwerker*, 74 N. Y. 234; *Allen v. Clarke*, 65 Barb. 563; Lindley Part., Vol. II, § 1095.

<sup>3</sup> *Ante, idem.* *Robbins v. Wells*, 18 Abb. Pr. 191; *s. c.* 26 How. Pr. 15; 1 Robt. 666; *Kingsland v. Braisted*, 2 Lans. 17; *Allen v. Clarke, supra*; *Witherhead v. Allen*, 3 Keyes, 562.

<sup>4</sup> *Witherhead v. Allen, supra*; *Miller v. White*, 50 N. Y. 187; *Moore v. Brink*, 4 Hun, 402; *s. c.* 6 N. Y. 22; 59 Barb. 484.

§ 367. **Dissolution of company** — In order to effect a dissolution of a joint-stock company, application must be made to a court of equity, unless the company is organized under the provisions of some particular statute, with a time fixed for its dissolution, or the existence of the company is predicated upon the happening of some certain event.<sup>1</sup> Where the company is organized for a fixed term, it is dissolved *ipso facto* at the expiration of the term, and where the existence of the company is to terminate on the happening of a certain event, the happening of such event would, of itself, cause a dissolution. And if the manner for terminating the existence of the company is provided by the articles of association, on the happening of some particular event, any one of the members of the company would have a right to insist on a dissolution, in the manner provided, on the happening of such event.<sup>2</sup> But a sale by a member, of his property, or the withdrawal of a stockholder from the association, will not operate as a dissolution of the company, so as to exonerate continuing members from assessments laid by the association, for the obligation would rest upon those who remain, after any withdrawal of a member from the company, to contribute their due proportion as previously agreed upon, to defray the expenses of sustaining the company.<sup>3</sup> Where a dissolution is decreed, the trustees should convert the assets into money, and distribute the proceeds among the stock-

<sup>1</sup> Wordsw. Joint Stock Cos., 392; Mann v. Butler, 2 Barb. Ch. 362; Walt's Act. & Def., Vol. IV., p. 166.

<sup>2</sup> Berry v. Cross, 8 Sandf. Ch. 1; Buckley v. Cater, 17 Ves. 19, note; Beaumont v. Meredith, 3 Ves. & B. 180; Ellison v. Bignold, 3 Jac. & W. 511. The exclusion of a member is sufficient ground for decreeing a dissolution. Gorman v. Russell, 14 Cal. 532; s. c. affirmed 18 Id. 688; Berry v. Cross, 8 Sandf. Ch. 1.

<sup>3</sup> Troy Iron & Co. Factory v. Winslow, 45 Barb. 231.

holders. They have no right to exchange the company's assets for stock in any other association, without the consent of the stockholders, and a member not consenting to such exchange may recover his stock so wrongfully disposed of.<sup>1</sup>

<sup>1</sup> *Penfield v. Skinner*, 11 Vt. 296; *Lake v. Mumford*, 12 Miss. 312; *Frothingham v. Barney*, 6 Hun (N. Y.), 366; *Mann v. Butler*, 2 Barb. Ch. 362.

## CHAPTER XXIII.

### COST-BOOK MINING COMPANIES.

- SECTION 368.** General nature of cost-book company.  
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§ 368. General nature of cost-book company. — Cost book companies are very common, although of modern origin, in England, and exist, to a limited extent, in the Western States and Territories of the United States. The company consists of an association of persons, organized for the purpose of working a mine or lode.<sup>1</sup> The capital of the company is divided into a number of shares, which are allotted and apportioned among the different members. A true cost-book mining company never has a fixed capital.<sup>2</sup> An agent is appointed by the members of the company to transact the company's business, and this

<sup>1</sup> Beach on Private Corporations, § 82, p. 157.

<sup>2</sup> Lindley on Partnership, 133, 348; MacSwinnay, 444.

agent is commonly called a "purser."<sup>1</sup> Such companies are usually organized for the purpose of prospecting for mineral, and the work is, generally, conducted under a mere license with the owner of the soil, with a contract for a future lease, in case valuable discoveries are made upon the land.<sup>2</sup> The rules of the company are very simple; all the concerns of the partnership are entered in the cost-book; the business of the company is transacted by the "purser" and the shareholders meet and adopt his reports and instruct him in regard to the affairs of the company's business, without the intervention or assistance of any other directing body.<sup>3</sup> The "purser" is the general manager of the mine, and all the business of the mining company that he represents.<sup>4</sup> He is given authority by the shareholders of the company to transact the business of the company, such as ordering the necessary materials to work the mine, and the securing of laborers and workmen necessary to carry on the mining operations;<sup>5</sup> but neither the "purser" nor a shareholder of the company

<sup>1</sup> Bainb. on Mines, 343; Arundell on Mines, 30; Blanchard & Weeks *Ld. Cas.* 538. "Cost-book companies were first known and chiefly exist in Cornwall and Devon. They are to be met with in Wales, Ireland, and other parts of England." MacSwinney Mines, p. 442.

<sup>2</sup> Beach on Cor., § 82; Wharton's Legal Dictionary, *tit.* Cost Book Min. Cos.; MacSwinney Mines, p. 443.

<sup>3</sup> "Mines conducted on the cost-book principle may be said to occupy an intermediate position between joint-stock companies and ordinary trading partnerships. Companies which adopt the cost-book system of management are often small associations, commencing with little capital, though with a full list of shareholders." (16 Jur. 22.) Blanchard & Weeks *Ld. Cas.*, p. 538, *et sub.*

<sup>4</sup> *Newton v. Dally*, 1 F. & F. 26; B. & W. L. C. 540; Beach on Pri. Cor., § 82; *In re Wrysgay Slate Co.*, 28 L. J. Ch. 894; *Kiltow v. Liskeard*, L. R. 10 Q. B. 9.

<sup>5</sup> Beach on Pri. Cor., § 82, *et sub.*; MacSwinney, p. 449; Wharton's Leg. Dict. *tit.* Cost Book Cos.; Bainb. on Mines, § 343, *et sub.*; *More v. Malachy*, 1 M. & Cr. 560; *Kilto v. Liskeard*, L. R. 10 Q. B. 9.

has any authority to bind the company for materials that are not necessary for carrying on the mining operations, or for borrowed money, or on any species of commercial paper, for such is not within the legitimate scope of the company's business.<sup>1</sup>

§ 369. **Cost-Book — What it is.** — The cost-book is an ordinary blank book into which the agreement for the business enterprise is recorded. The affairs and proceedings of the company are transcribed therein, together with the minutes of each regular meeting, signed by the members present at such meeting, the whole being kept or regulated, by or under the supervision of the "purser."<sup>2</sup> It contains, among other things, the names of all the shareholders and the number of shares held by each, together with the transfer of shares and the accounts of the respective shareholders with the company; the receipts and expenditures of the mine, and such other matter, connected

<sup>1</sup> *Burmester v. Norris*, 6 Exch. W. H. & G. 796; *Blan. & Weeks Ld. Cas.*, p. 540; *Howtayne v. Bourne*, 7 M. & W. 595; *German Mining Co.*, 4 De G., M. & G. 40; *MacSwinney on Mines*, pp. 460, 461; *Brown v. Byers*, 16 M. & W. 352; *Dickinson v. Valpy*, 10 B. & C. 128; *More v. Charles*, 5 E. & B. 978; *Nichols v. Diamond*, 9 Exch. 154; 28 L. J. Ex. (N. S.) 1. "By attempting, however, to accept bills for the company, the purser may make himself personally liable, though the company will not be held, as where a bill directed to 'J. A. Purser, West Downs Mining Company,' was accepted by him in these terms, 'J. A. accepted per proc, West Downs Mining Company.' No authority to accept bills for the company being shown, he was held individually liable as a member of the company. (*Nichols v. Diamond*, 28 L. J. Ex. (N. S.) 1; *Owen v. Van Uster*, 10 Com. B. 318.) It must appear in some manner that he is a member of the company." *Blan. & Weeks Ld. Cas.*, p. 339; *Ricketts v. Bennett*, 4 C. B. 686.

<sup>2</sup> "The cost-book is not evidence against strangers claiming adversely to the adventurers." *Curling v. Flight*, 6 Hare, 41; s. c. 2 Phillips, 618, M. M. D. 58; *Beach on Cor.*, § 82; *Wordsworth on Mines*, 193; *Bainb.* 93; *MacSwinney*, p. 444.



with the operation of the mine, as the "purser" may, from time to time, deem necessary to be recorded therein.<sup>1</sup>

§ 370. **Distinguished from ordinary partnership.** — Cost-book companies are governed by many of the same rules that apply to ordinary mining partnerships, but there are many rules governing their manner of dealing with third persons, and limiting the liability of the members, that are peculiar only to cost-book companies.<sup>2</sup> Such companies, like ordinary partnerships, are formed by agreement and governed by the general laws of partnership, except so far as that law is controlled by local custom or special agreement.<sup>3</sup> As in the case of a partnership, a member of a cost-book company can transfer his interest in the mine at any time, and the party to whom the same is transferred becomes a member of the association, regardless of the will of the other partners, concerning the change.<sup>4</sup> The shares of an individual member of a cost-book company, however, can be sold and transferred, or forfeited by the company itself, in case of the non-payment of calls,<sup>5</sup> and this, together with the fact that the en-

<sup>1</sup> Bainb. on Mines, § 343; Arundel on Mines, 80; 16 Jurist, 22; Blaneard & Weeks Ld. Cas. on Mines, etc., 538. The "costs" are entered, hence the name "cost-book." MacSwinney, p. 444.

<sup>2</sup> Kahn v. Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 261; Skillman v. Lachman, 28 Cal. 206; Beach Pri. Cor., § 179; MacSwinney, p. 478.

<sup>3</sup> In re Bodwin U. Min. Co., 23 Beav. 370. But the cost-book system must be proved as a custom or local rule and is not judicially noticed. *Ante, idem.* MacSwinney, p. 478; Freum's Case, 4 De G., M. & G. 298.

<sup>4</sup> Beach on Pri. Cor., § 179, p. 311; Bissell v. Foss, 114 U. S. 261, and Kahn v. Smel. Co., *supra*.

<sup>5</sup> If no notice is required before forfeiture none is necessary and the shareholder loses his shares *ipso facto*. B. & W. L. C., p. 544-545; Stewart v. Anglo-California Gold Min. Co., 21 L. J. Q. B. (N. S.) 898. But forfeiture is not necessarily incident to a cost-book company; it can only exist by express stipulation and is then *strictissimi juris*. *Ante, idem.*

the business of the company is transacted by the "purser" alone, while in the case of a partnership all the different members of the firm have a right to participate in the management of its affairs, forms one of the principal distinctions between the two.<sup>1</sup>

§ 371. **Proof of membership.**—The usual manner of proving membership in a cost-book mining company is to show that the party has signed the cost-book, or given authority for his name to be entered therein. It is held to be a part of the cost-book principle for a register of the stockholders to be kept, and every member should sign, either the book itself or the authority for the insertion of his name.<sup>2</sup> But signing the cost-book is not really essential to constitute one a member of a cost-book company, and in the face of direct proof of membership, a failure

"The partnership is not necessarily determined at the time of the declaration of forfeiture for non-payment of shares. The partner may be entitled to an account and to the appointment of a manager and receiver, and as he had a legal interest in the mine he is not to be affected by the acts of his partners declaring his shares forfeited, unless they are fully authorized to do so." (*Hart v. Clarke*, 27 L. J. (N. S.) Ch. 615; 19 Beav. 849; 6 H. L. C. 688; 24 L. J. (N. S.) Ch. 187; 5 De G., M. & G. 233.) B. & W. L. C., p. 545. "But where the articles provided that if a shareholder should neglect to pay calls the company might give him notice of forfeiture, and further, that if default should be made in payment the directors might pass a resolution to forfeit the shares, and that an entry of such forfeiture should be made in the books and notice thereof given to the shareholder, and the forfeited shares should belong to the company, a shareholder who was in default was notified of the forfeiture and it was held complete, although no resolution was proved to have been passed, but only entries made in the books." (*In re North Hollen Beagle Tin & Copper Mining Co.*, 36 L. J. (N. S.) Ch. 817; L. K. 2 Ch. 821.) B. & W. L. C., p. 545.

<sup>1</sup> Beach on Pri. Cor., § 179; *Rickets v. Bennett*, 4 M. G. & S. 686; *Collyer*, 93; *Charles v. Eshleman*, 5 Colo. 107.

<sup>2</sup> Beach on Pri. Cor., §§ 6, 29; *Lindley on Part.* 149, 150; *Collyer*, 93; *Tippet v. Johns*, Top. 187; *MacSwinnay*, p. 444.

to sign the cost-book could not be resorted to for the purpose of avoiding the consequent liability,<sup>1</sup> and the question of membership in such a company, will, therefore, ordinarily, be determined in precisely the same way as the existence of membership in an ordinary mining partnership,<sup>2</sup> to which subject the reader is referred.

§ 372. **Signing not essential.** — From the general principles of law applying to all unincorporated companies, unless a cost-book company is incorporated, whereby the liability of the members and the company would be limited to a fixed capital,<sup>3</sup> it is presumed that as between himself and third parties, a person could incur the liability of a shareholder, if he was such in fact, without signing the cost-book or any authority for the insertion of his name,<sup>4</sup> and although such signature is usually made, it is not considered an absolute prerequisite to the performance of the duties, the enjoyment of the rights and an assumption of the liabilities of a stockholder, as between himself and the other members of the company; but after the investment of a certain portion of the capital and the payment of the calls thereon, one is entitled to perform all the duties and enjoy all the rights accompanying such a membership.<sup>5</sup>

§ 373. **Character of member's interest.** — It has been held to be essential to an interest in a cost-book mining company, that the members of the company should each

<sup>1</sup> Lindley on Part., *supra*; Wharton's Law Lexicon; Hawkins' Case, 2 Kay & J. 258; MacSwinney, p. 445.

<sup>2</sup> *Ante, idem.* Hawkins' Case, *supra*; Bowen's Case, 4 W. R. 800.

<sup>3</sup> See Chap. on *Joint-Stock Cos.*; Lampen v. Smith, 3 B. & C. 937.

<sup>4</sup> Lindley on Part., 149, 150; Geoke v. Jackson, 36 L. J. C. P. 108; Hawkins' Case, 2 K. & J. 258; MacSwinney, p. 445.

<sup>5</sup> Lindley on Part., *supra*; Cillyer on Mines, 98-100; Thomas v. Hobler, 4 De. G., F. & J. 199; Bowen's Case, 4 W. R. 800.

have an interest in the mine as real estate;<sup>1</sup> but this position is hardly borne out by the authorities, for the shares could just as well be represented by a money capital, as an interest in the land as such,<sup>2</sup> and there is apparently no plausible reason why a different rule should obtain than that which prevails in the case of an ordinary mining partnership.<sup>3</sup> Of course, where the interest did extend to the land, an instrument in writing would be necessary in the transfer,<sup>4</sup> but where the share was represented by a mere money capital, no writing would be necessary; it would not be within the statute of frauds, and a complete transfer of such share could be made by an entry in the cost-book, for when one's name has been entered therein, in respect to shares accepted by himself, he is a shareholder, although no instrument in writing has been executed.<sup>5</sup>

§ 374. *Liability of shareholders.* — It has been held, in the case of cost-book companies, that after a shareholder has transferred his share, if the calls have all been

<sup>1</sup> *Watson v. Spratley*, 10 Ex. 222.

<sup>2</sup> *Watson v. Spratley*, *supra*; *Mor. Min. Dig.*, p. 59; *Roberts v. Eberhardt*, Kay, 148; *Decker v. Howell*, 42 Cal. 642; *Blanchard & Weeks Ltd. Cas.* 538.

<sup>3</sup> *Bainb. on Mines*, 348 *et seq.*; *Arundell on Mines*, 80; 16 *Jurist*, 22; *B. & W. L. C.* 538.

<sup>4</sup> *Powell v. Jessop*, 118 C. B. 385; *Riddle v. Brown*, 20 Ala. 412.

<sup>5</sup> See *Rogers on Mines* (382) for criticism of *Vice v. Lady Anson* (7 B. & C. 409). See also *Watson v. Eales*, 26 L. J. Ch. (N. S.) 361; *Blanchard & Weeks Ltd. Cas.*, p. 541: "The opinion of Lord Tenterden was based," says Mr. Rogers, "on the supposition that the shares in the mine were interests in land within the statute of frauds; but this view is erroneous, for it is settled that they are not; and even a parol contract for the sale of shares in a cost-book mine is sufficient and need not be in writing." *Rogers on Mines*, 382; citing *Watson v. Spratley*, 10 Exch. 237; *Northey v. Johnson*, 19 L. T. 104; *Powell v. Jessop*, 25 L. J. C. P. (N. S.) 199; *B & W. L. C.*, *supra*.

fully paid up on the same, he cannot be held for any past or future debts of the company,<sup>1</sup> and while this is undoubtedly true in regard to the future debts of the company, as the shareholder's liability on his shares would be determined by a transfer of the same,<sup>2</sup> the rule in regard to the past debts of the company is otherwise in the United States, for although a shareholder can get rid of his liability by transferring his shares, as between himself and his co-shareholders,<sup>3</sup> his liability to creditors of the company is controlled by the same rules that would apply in the case of an ordinary partnership, and without the creditor's consent, the liability of a shareholder for a past debt of the company would not be terminated by an assignment of his shares.<sup>4</sup> But a shareholder would not be liable to contrib-

<sup>1</sup> In re Welsh Potosi Min. Co., Lofthouse's Case, 2 De G. & J. 69; South Lady Bertha Co., 2 J. & H. 388; Libre's Case, 30 L. T. 186; MacSwinney, 467.

<sup>2</sup> Thomas v. Clark, 18 C. B. 660; MacSwinney, p. 467; Lanyon v. Smith, 3 B. & S. 945. "The transfer of shares in a mining concern (cost-book) carries with it liability for the prior debts of the concern." Mayhew's Case, 5 De G., M. & G. 837; M. M. D., p. 60; Cox's Case, 4 De G., J. & S. 55; Worthey v. Johnson, 19 L. T. 204.

<sup>3</sup> "It is the rule of the cost-book system that as between the existing shareholders and apart from their liability to the then existing creditors of the concern, any shareholder may retire on paying up all the calls then due from him at that time." In re Bodwin U. M. Co., 23 Beav. 370; M. M. D. 60. "When the owner of shares in a cost-book company has parted with them and afterward the remaining members register it as a joint-stock company, there is no identity of companies or of liabilities, and the outgoing shareholder must answer to his common law liability for debts contracted by the cost-book company, but is not to be proceeded against as a contributory of the joint-stock company." Lanyon v. Smith, 3 B. & S. 937; Harvey v. Clough, 8 Law Times (N. S.) 324; M. M. D. 60.

<sup>4</sup> Blanchard & Weeks Ltd. Cas., pp. 543-544; Vice v. Lady Anson, 9 B. & C. 409; Rogers on Mines, 382; Watson v. Spratley, 10 Exch. 237; Northey v. Johnson, 19 L. T. 104; Powell v. Jessopp, 25 L. J. C. P. (N. S.) 199; Lindley on Part. 133; Hawkins' Case, 2 Kay & J. 253; Coll-

ute to the assets of the company, if he had ceased to be a shareholder two years prior to the time when the mine was last worked, or before the date of the winding-up order, for this has been specially provided for by statute.<sup>1</sup>

§ 375. **Same—Member's authority to bind company.**—There is no implied authority, either in a member or the general superintendent of a cost-book company, to bind the association or its members on a contract in the name of the company, and the company cannot be held on such a contract,<sup>2</sup> and especially when it is not necessary for carrying on the mining operations, unless special authority to make such a contract has been delegated by the company.<sup>3</sup> The different members of the company are regarded as co-adventurers, and they have no authority, as such, to pledge the credit of the company for borrowed money, even though it was borrowed for purposes of the concern;<sup>4</sup> and the rule

yer on Mines, 98; Wordsworth Law of Mining, 193; Beach on Pri. Cor. 179; Bainb. 343; Arundell on Mines, 30; 16 Jurist, 22; Peel v. Thomas, 15 C. B. 714.

<sup>1</sup> Lindley on Part. 133, 343. "The transferor becomes free from all liability as soon as he procures his transferee's name to be registered." MacSwinney Mines, p. 464; Thomas v. Clark, 18 C. B. 662; Cox's Case, 4 De G., J. & S. 55; Lanyon v. Smith, 3 B. & S. 945; Watson v. Eales, 23 Beav. 294. "But a mining company, on the cost-book system, formed before the passing of the joint-stock companies' winding-up act, 11 and 12 Vict., c. 45, is not within its operation." In re Wheal Lovell M. Co.; Ex parte Wyld, 18 Law J. Ch. 139; 1 Mac. & Gor. 1; M. M. D., p. 61.

<sup>2</sup> "The prohibition extends to directors, pursers, and agents, and to one member acting for another." B. & W. L. C., p. 539; Ricketts v. Bennett, 4 Com. B. 686; Burmester v. Norris, 6 Ex. Ch. W. H. & G. 796; Beach Pri. Cor., § 179 p. 311; Skillman v. Lachman, 28 Cal. 206; MacSwinney, p. 460.

<sup>3</sup> Beach, *supra*; Jones v. Clark, 42 Cal. 180; Charles v. Eshleman, 5 Colo. 107; MacSwinney, p. 460; Lindley on Part., §§ 133, 343; Hawtornyn v. Bourn, 7 M. & W. 595.

<sup>4</sup> *Ante, idem.* Burmester v. Norris, 6 Ex. W. H. & G. 796; B. & W. L. C. 538, 540; German Min. Co., 4 De G. M. & G. 40.

is just the same in regard to the managing agent of the company, for the mere fact that he has charge of the business of the association does not give him any implied authority to borrow money on the credit of the company.<sup>1</sup> But the doctrine of agency applies to cost-book companies the same as ordinary partnerships, and where the "purser" acts within the general scope of his authority, each member of the company is liable to creditors who have furnished the company with necessities for carrying on the mining operations, provided they are furnished in the customary manner, and this liability could not be avoided by the company even though the creditor had no knowledge at the time he furnished the materials that they would be used in the business of the company.<sup>2</sup>

§ 376. **Same — Liability for torts of company.** — It results from the partnership relation and consequent liability of the members of a cost-book mining company, that for torts of the company, or its authorized agents, in the line of and within the general scope of the company's business, the members are liable.<sup>3</sup> Accordingly, the members of a cost-book mining company have been held liable in damages for a nuisance, resulting from the working of the company's mine.<sup>4</sup> But as the liability of a shareholder ends with the transfer of his shares,<sup>5</sup> he would not be re-

<sup>1</sup> *Burmester v. Norris*, *supra*; B. & W. L. C. 540; *Beach on Pri. Cor.*, § 179 *et seq.*; *Jones v. Clark*, *supra*; *Charles v. Eshleman*, 5 Colo. 107; *Lindley on Part.*, §§ 138 and 348. But see *Newton v. Dally*, 1 F. & F. 26; B. & W. L. C., p. 540.

<sup>2</sup> *Collyer on Mines*, 93; *Wordworth's Law of Mining*, 193; cf. *Hawkins' Case*, 2 Kay & J. 253; *Beach on Pri. Cor.*, *supra*; *Cox' L. Case*, 4 De G., J. & S. 56; *Turner v. Hill*, 11 Sim. 1; *MacSwinney*, p. 459.

<sup>3</sup> *MacSwinney*, p. 462.

<sup>4</sup> *Matthews v. King*, 3 H. & C. 910; *MacSwinney on Mines*, *supra*.

<sup>5</sup> *Curling v. Filght*, 6 Ha. 45; *More v. Malachy*, 1 M. & Cr. 560; *MacSwinney Mines*, p. 466.

sponsible for the commission of a tort, unless he had notice of same prior to the transfer.<sup>1</sup>

§ 377. **Transfer of shares.** — As before explained, a member can transfer his shares and the consequent liability on the same, so far as his partners are concerned, without the consent of the other members of the company, and without a dissolution of the company.<sup>2</sup> This is done by a transfer,<sup>3</sup> or a simple relinquishment<sup>4</sup> of the shares, providing the rules of the company do not prohibit it,<sup>5</sup> and as soon as the notice of relinquishment is given the “purser,” or the fact of the transfer entered by him in the cost-book, the new membership of the transferee of the shares in the company becomes complete.<sup>6</sup> The mode of transferring the shares, like all other business of such companies, is very simple; <sup>7</sup> it is usually done by a written instru-

<sup>1</sup> *Matthews v. King*, *supra*; *MacSwinney*, p. 462.

<sup>2</sup> “Any adventurer may transfer his shares without the consent of his co-adventurers, the transfer, as soon as registered, working a dissolution of the partnership as to him, and the liability ceasing. Death or bankruptcy does not necessarily have that effect.” (*Rogers on Mines* 381.) *Blan. & Weeks Ld. Cas.*, p. 540.

<sup>3</sup> *Rogers on Mines*, 383-384.

<sup>4</sup> “The relinquishment should be an absolute surrender of the share into the hands of the company for the benefit of the other adventurers, and of all interest in the mine, and the engines, machinery, and personal effects of and belonging to the mines, and it may then be in any form.” (*Rogers*, 384.) *Blan. & Weeks Ld. Cas.* 541.

<sup>5</sup> See, as to rule requiring notice to person, *Mayhew's Case*, 5 De G., M. & G. 837; *Fenn's Case*, 4 De G., M. & G. 285; *In re Welsh, Potosi M. Co.*; *Lofthouse's Case*, 2 De G. & J. 69. Whether a relinquishment or transfer has occurred is a question for the jury. *Courteis v. Johnson*, 10 Exch. 242, note; *Mor. M. Dig.* 60.

<sup>6</sup> *Rogers on Mines*, and authorities, *supra*.

<sup>7</sup> “The instrument of transfer should state that the transferor sells, signs, and transfers, for a valuable consideration, parts or shares in a certain mine or adventure, naming it, and giving its location, together with a like share or proportion of and in the engines, tools, tackle,



ment, in which the transferor acknowledges that he has transferred, and the transferee that he has accepted<sup>1</sup> the shares mentioned, which document is signed by both parties and addressed to the "purser," and the entry of the fact of the transfer by the "purser," in the cost-book of the company, regardless of the form of the entry, has the effect of introducing a new partner into the concern.<sup>2</sup> And the other members of the company have no right to object to the introduction of a new partner into the company, provided he buys his shares from a member of the company, for, as before explained, the *delectus personæ* of other partnerships has no application to the case of cost-book companies.<sup>3</sup>

§ 378. **Calls — Liens — Foreiture.** — The different members are liable to calls on their respective shares,<sup>4</sup> and in default of a payment thereof, the company has a lien upon such shares for the calls due,<sup>5</sup> the "purser" can sue to enforce the

materials, ores, moneys, and appurtenances and fixtures generally belonging to it, and in all dividends and profits in respect to the shares, and all interests, privileges, and vantages to be derived therefrom." *Blan. & Weeks Ld. Cas.* 541.

<sup>1</sup> "The transferee should indorse on the same instrument, in apt words, a certificate that he accepts the said shares, describing them, subject to the same terms and conditions, rules and regulations, as the transferor held them." *Blanchard & Weeks Ld. Cas.*, *supra*.

<sup>2</sup> *Wharton's Law Lexicon*, *tit. Cost-Book Min. Cos.*; *Beach on Pri. Cor.*, § 629; *Lindley on Part.* "The transferor should not afterward hold himself out as an adventurer, or in any way interfere with the company's affairs, or he will be held liable for so doing." (*Rogers on Mines*, 383, 384; citing *Re Bodwin United Mines*, 26 L. J. Ch. 570; *Northey v. Johnson*, 19 L. T. 104.) *Blanchard & Weeks Ld. Cas.*, p. 541.

<sup>3</sup> *Collyer on Mines*, 93; *Dickinson v. Valpy*, 10 B. & C. 128; *Bissell v. Foss*, 114 U. S. 252; *Kahn v. Smelting Co.*, 102 U. S. 641; *MacSwiney Mines*, p. 468; *Libri's Case*, 30 L. T. 186; *Watson v. Spratley*, 10 Exch. 222.

<sup>4</sup> *MacSwiney Mines*, p. 453.

<sup>5</sup> *Hart v. Clarke*, 6 De G., M. & G. 249; *Watson v. Erles*, 23 Beav. 374.

company's lien,<sup>1</sup> and the shares forfeited for non-payment of the calls.<sup>2</sup> But independently of statute, calls could not be made for future expenses,<sup>3</sup> and in any event, to authorize a forfeiture, it would seem there should be a default in the payment of calls regularly issued.<sup>4</sup>

**379. Right to an accounting.**—As in the case of an ordinary mining partnership, any member of a cost-book company is entitled to an accounting,<sup>5</sup> and in such a proceeding it is not necessary to seek a dissolution of the company.<sup>6</sup> The company may maintain an action against a member for a fraud upon its rights;<sup>7</sup> a member can sue for a fraud and by tendering his shares recover his payments made thereon,<sup>8</sup> and a member can sue a member for an account upon particular shares.<sup>9</sup> In a suit by a member against the company, however, all the members must generally be made parties to the action.<sup>10</sup>

<sup>1</sup> *Teppet v. Johns*, Topping, 187; *Graves v. Cook*, 2 Jur. (N. S.) 475.

<sup>2</sup> *Peel v. Thomas*, 15 C. B. 714; *MacSwinney*, p. 453. Forfeiture is authorized by statute in England, 32 & 33 Vict., Ch. 19, Sec. 16.

<sup>3</sup> *MacSwinney*, p. 453.

<sup>4</sup> *MacSwinney Mines*, *supra*. "A power in coadventurers to forfeit the shares of one of their number for non-payment of calls is not necessarily incident to a mining adventure conducted on the cost-book principle." *Clarke v. Hart*, 6 H. L. Cas. 633. See *Clarke v. Hart*, 19 Beav. 349; 6 De G., M. & G. 232. "Where such a power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed." *Id.* M. M. D. 174.

<sup>5</sup> *MacSwinney Mines*, p. 451; *Sibley v. Minton*, 27 L. J. Ch. 53.

<sup>6</sup> *Ante*, *idem*.

<sup>7</sup> *More v. Malachy*, 1 M. & Cr. 559; *Turner v. Hill*, 11 Sim. 1; *Turner v. Borlase*, 11 Sim. 17.

<sup>8</sup> *Clark v. Dickson*, E. B. & E. 148.

<sup>9</sup> *More v. Malachy*, *supra*. See Chapter, *Accounting*.

<sup>10</sup> *Cox v. Stephens*, 11 N. B. 929; *Sibley v. Minton*, *supra*.

§ 380. **Contribution.** — When the company is unable to pay its debts in the usual course of business, a member who is sued for a company's debt by creditors of the company, if he is not behind with his own calls, can obtain contribution from his associates.<sup>1</sup> The right to contribution, however, cannot be enforced by a member in arrears with his calls,<sup>2</sup> for having embarrassed the company by a failure to pay his own calls, he is in no condition to complain of others for the same acts.

§ 381. **Right of shareholder to retire.** — A shareholder in a cost-book mining company may retire at any time, upon a relinquishment of his shares and payment of his dues to the company.<sup>3</sup> The right to retire is established by custom and therefore imported into the contract by which the members of such companies are mutually bound. Any restriction upon such right would not be enforced by the courts, as in accordance with a sound public policy, but the company would have a perfect right to prescribe rules preliminary to the surrender of a member's shares, and a rule providing for a written notice to the "purser," for the surrender of a member's stock, would be supported by the courts as a reasonable and necessary regulation.<sup>4</sup> But

<sup>1</sup> Welsh Potosi Co., 27 L. J. Ch. 311; Tretoil & Co., 2 J. & H. 421; Wheal Alma Co., 11 W. R. 330; Peimont Co., 15 Jur. 1192.

<sup>2</sup> Wyld's Case, 1 May & G. 1.

<sup>3</sup> In re Bodwin U. Min. Co., 23 Beav. 370. And his liability is terminated with such surrender. In re Welsh Potosi Min. Co., Lofthouse Case, 2 De G. & J. 69; Birch's Case, 28 L. J. Ch. 894; MacSwiney, p. 470; B. & W. L. C., p. 543-44.

<sup>4</sup> "Thus, where a regulation provided that any shareholder might determine his responsibility or liability upon giving notice in writing to the purser of his desire of retiring, and upon depositing with the purser the transfer of the shares held by him, and signing a relinquishment of all claims or demands on the company in respect to such shares, these provisions being complied with, the liability of the shareholder ceased."

where it was proved to be the established custom of a company to permit shareholders to retire, upon any terms agreed upon at a public meeting, and a member was allowed, at a general meeting, to surrender his shares, it was held that he had ceased to be a shareholder, notwithstanding the fact that he had failed to pay the arrears of calls that were assessed against him on the same.<sup>1</sup>

§ 382. **Local custom must be proved.**—The general law of partnership applies to all cost-book mining companies and when this law is to be governed by local custom, the custom must be specially pleaded and proved by the party relying on the same,<sup>2</sup> for the courts will not take judicial notice of what the cost-book principle is, but will invariably apply the general law of partnerships to companies organized on that principle, unless it is proved that such law does not apply.<sup>3</sup> And it is not sufficient to show

(Fenn's Case, 4 De Gex, M. & G. 285.) But this was a controversy between the members. See Mayhew's Case, 24 L. J. Ch. (N. s.) 385; Welsh Potosi M. Co., *supra*.

<sup>1</sup> In re Bodwin Union Min. Company, 23 Beav. 370. "The transferee of shares is liable to the company. The transfer carries with it a transfer of liabilities." (Ex parte Mayhew, 24 L. J. Ch. (N. s.) 385.) Blanchard & Weeks Ltd. Cas. 544. But a transferee in a company requiring transfers to be registered in order to convey an interest, is not liable for debts of the company contracted before registry of his shares. Thomas v. Clark, 18 C. B. 660. But see, generally, on liability of members, after withdrawal, to third parties. Blanchard & Weeks Ltd. Cas. (544), where the author, in commenting on Fenn's case (*supra*), says: "This case, however, it must be borne in mind, was a controversy between the shareholder and the officers of the company, and not a question of individual liability to third parties." See, to the same effect, Case of the Welsh Potosi Mining Co., 27 L. J. B. K. (N. s.) 1; 4 *Ibid.* Ch. 311 (limited); 2 De Gex & J. 10, 69; Case of the Bodwin United Mines, 26 L. J. Ch. (N. s.) 570; B. & W. L. C. *supra*.

<sup>2</sup> In re Bodwin U. Min. Co., 23 Beav. 370; Curling v. Flight, 6 Hare. 41; Fenn's Case, 4 De G., J. & S. 293.

<sup>3</sup> *Ante, idem.* Dickinson v. Valpey, 10 B. & C. 128; Frank Mills Co., 23 Ch. D. 55; Richardson's Case, 4 W. R. 670.

that a custom had provided, or that a certain rule was adopted. If such an issue is made, the party invoking the aid of a local rule or custom, must show that the same is still in force,<sup>1</sup> or was at the time his rights were acquired.<sup>2</sup> But when the existence of a local rule or custom has been clearly established by competent proof, the courts will, as often as such custom is brought into question, recognize the same, as fixing the rights of all those within the section where the custom in question is in force, unless the same is unreasonable, or in conflict with positive law, as definitely as could be done by statute.<sup>3</sup>

§ 383. **Suits by and against.** — All unincorporated companies that are not empowered by statute to sue or be sued by a public officer, must sue and be sued like an ordinary partnership.<sup>4</sup> In England, cost-book mining companies have been empowered by statute to sue in the name of their "purser,"<sup>5</sup> but it does not follow, because a company is empowered by a statute to sue and be sued by a public officer, that a creditor may not sue any one or more of the members constituting the company upon which such right

<sup>1</sup> *Pralus v. Jefferson G. & S. M. Co.*, 34 Cal. 558; *Harvey v. Ryan*, 42 Cal. 626.

<sup>2</sup> *T. M. Tunnel Co. v. Stranahan*, 81 Cal. 387.

<sup>3</sup> *Hicks v. Bell*, 8 Cal. 219; *Fairbanks v. Woodhouse*, 6 Cal. 434; *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Gore v. McBrayer*, 18 Cal. 533; *Coleman v. Clements*, 23 Cal. 243; *Bradley v. Lee*, 38 Cal. 362; *Strong v. Ryan*, 46 Cal. 83; *Robertson v. Smith*, 1 Mont. 410; *Belk v. Meagher*, 3 Mont. 65; *Smith v. North Amer. Min. Co.*, 1 Nev. 123; *Leet v. John Dore Silver Min. Co.*, 6 Nev. 218; *Golden Fleece v. Cable Car Min. Co.*, 12 Nev. 312; *Sparrow v. Strong*, 3 Wall. 104; *Basey v. Gallagher*, 20 Wall. 679; *Atchison v. Peterson*, 20 Wall. 507; also 3 Wall. 800-777.

<sup>4</sup> *Lindley Part.* 149, 150; *Turner v. Hill*, 11 Sim. 1; *Cox's Case*, 4 De G., J. & S. 56; *MacSwiney Mines*, p. 459.

<sup>5</sup> *MacSwiney Mines*, p. 446; *Escott v. Gray*, 47 L. J. C. P. 606. But in the absence of statute, in suits against the company all the members must be joined. *Sibbey v. Minton*, 27 L. J. Ch. (N. S.) 53.

is conferred,<sup>1</sup> for creditors are not deprived of their common law right to pursue the property of their debtors by an act of the legislature which is consistent with the retention of such a right, and it has been held that although a creditor might sue the public officer of a debtor company, it is not incumbent on him to do so, but he can pursue his remedies against any one or more of the members composing such company.<sup>2</sup> Nor would the authority given the "purser" by statute to represent the company in the suits by and against the same, empower him to represent one set of shareholders against another, in an action between different members of the company, for he is only the representative of the entire body of shareholders and could not exercise his authority to the prejudice of certain members of the company whose rights it was intended he should protect.<sup>3</sup>

§ 384. **Same — Power of majority.** — The majority of the shareholders of a cost-book company have no power to bind a minority of the shareholders of the company, with reference to a relinquishment of their shares.<sup>4</sup> Both principle and authority are opposed to such a doctrine. Nor could the shareholders delegate the authority to the "purser," to accept a surrender of such shares, for this would be an illegal appropriation of one's property.<sup>5</sup> But if certain shares have been surrendered with full knowledge of the shareholders, and all the circumstances, in connection

<sup>1</sup> MacSwinney Mines, p. 459; *Turner v. Borlose*, 11 Sim. 18.

<sup>2</sup> Lindley on Part. 149, 150; MacSwinney Mines, 420, 421, 459; *Cox's Case*, 4 De G., J. & S. 56; *Escott v. Gray*, 47 L. J. C. P. 606.

<sup>3</sup> *Ante, idem.* MacSwinney, p. 455; *Tippett v. Johns*, Topping, 187.

<sup>4</sup> Lindley on Part. 149, 150; MacSwinney, p. 470; *Northey v. Johnson*, 19 L. T. 104; *Palmer's Case*, 7 Ch. 286.

<sup>5</sup> *Ante, idem.* *Hybert v. Evans, supra*; *B. & W. L. C.* 544; *Hybert v. Parker*, 27 L. J. C. P. (N. S.) 120.

with the surrender, have been disclosed to the company, it would afterward be precluded from disputing the validity of the surrender, if such surrender had not been questioned for a considerable time.<sup>1</sup>

§ 385. **Dissolution — Sale of assets.** — As a general rule, and by statute in England<sup>2</sup> the members of a cost-book company can, by resolution, dispose of the property of the company at public auction,<sup>3</sup> and, if the company is insolvent, a winding-up order can be obtained,<sup>4</sup> and all proceedings against the company restrained<sup>5</sup> until the proceeds of the property can be applied to the payment of the debts, the wages of miners, under the English statute, being preferred debts.<sup>6</sup> But no sale or winding-up order will be made if the rights of creditors or lessors would be jeopardized thereby;<sup>7</sup> the creditor could enforce his lien for debt against the property<sup>8</sup> and the sale<sup>9</sup> or removal<sup>10</sup> restrained until judgment could be obtained thereon.<sup>11</sup>

<sup>1</sup> See, generally, as to recognition of surrender and transfer by company, B. & W. L. C. 541.

<sup>2</sup> Comp. Act, 1862, § 4; MacSwinney Mines, p. 475.

<sup>3</sup> MacSwinney, pp. 449, 475.

<sup>4</sup> *Idem*, 476.

<sup>5</sup> *Geoke v. Jackson*, 86 L. J. C. P. 108.

<sup>6</sup> 32 & 33 Vict., Ch. 19, Sec. 26.

<sup>7</sup> *Hoyton v. Tucker*, 4 K. & J. 243.

<sup>8</sup> *Cox's Case*, 4 De G., J. & S. 56; *Turner v. Hill*, 11 Sim. 1.

<sup>9</sup> MacSwinney, p. 475.

<sup>10</sup> *Ante, idem*.

<sup>11</sup> *Hoyton v. Tucker, supra*.

## CHAPTER XXIV.

### RIGHTS AND DUTIES OF MINE EMPLOYERS AND EMPLOYEES.

#### SECTION 386. Character of the relation.

- 387. Contract of hiring.
- 388. Wages — How paid.
- 389. Owner should furnish safe machinery.
- 390. Should furnish suitable employees.
- 391. Same — Negligence of fellow-servants.
- 392. Same — Who are fellow-servants in a mine.
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- 402. Acts resulting in death.
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§ 386. Character of relation. — The relation of mine owner and employee is similar in law to that generally discussed in the text-books under the head of master and servant, and while the law governing the master and servant is not, as a whole, sufficient to adjust the relative rights and duties of the mine owner and employee, the law governing the actions and rights of individuals occupying the former relation has been so extended and enlarged from time to time, that many, if not most of the civil injuries which occur to parties acting in the service of other persons, with a very few exceptions, are included under and embraced within the general scope of the law which originally applied to the master and persons engaged in his



service who occupied but an inferior or subordinate position.<sup>1</sup> As in the case of the master and the servant, the mine owner is generally responsible for injuries that his employees may receive by reason of his failure to use that care and prudence which the hazard of the business and his own position would call for, or which are but the approximate cause or natural consequence of his own neglect or carelessness.<sup>2</sup> It is also considered negligence in the master or owner to knowingly permit any peril to continue that renders the employment more hazardous, and which could be removed by him.<sup>3</sup> And while knowledge of the servant or employee and his right to quit the service and thus avoid the dangers of his employment, would seem to diminish the liability of the owner;<sup>4</sup> still the latter may be held responsible for an injury to the servant after he has assured the servant that he will have the dangers removed, for until he makes his assurance good and has the danger removed in accordance with his promise, he is not in the exercise of that care and prudence which the nature of his position requires.<sup>5</sup>

<sup>1</sup> For a full discussion of the changes and extension of this doctrine by the courts see Cooley on Torts, 48, 146, 622 *et sub.* *Tiffin v. McCormack*, 2 Mor. Min. Rep. 194.

<sup>2</sup> *Cox v. Great West. &c. Co.*, 9 Q. B. 106. But an employer can relieve himself by agreement from responsibility under the Eng. Em. Lia. Act. See *Griffith v. Earl Dudley*, L. R. 9 Q. B. D. 857. But see *Little Rock Co. v. Eubanks*, 8 S. W. Rep. 808; *Kansas &c. Co. v. Peavey*, 29 Kan. 169.

<sup>3</sup> *Dewees v. Meramec Iron Co.*, 54 Mo. App. 476; *Fugler v. Bothe*, 117 Mo. 475; Cooley on Torts, pp. 661, 662; *Conroy v. Vulcan Iron Co.*, 6 Mo. App. 102; *Harris Dam. by Cor.*, 511, 977, *et sub.*

<sup>4</sup> *Watson v. Kansas and Texas Coal Co.*, 52 Mo. App. 866; *Hughes v. Fagin*, 46 Mo. App. 37. But as to latent defects see *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 864.

<sup>5</sup> *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102; Cooley on Torts, pp. 661, 662. If the defect is one that a prudent servant would continue to work, after promise, the employer is liable. *Hough v. Ry. Co.*, 100

§ 387. **Contract of hiring.** — If one employs another to work for him for a definite period the employer must furnish the employee work for the entire period and if the employer fails to provide work for the employee, he cannot deduct from the wages of the employee for the time that he was not at work.<sup>1</sup> Where the employer only undertakes, however, to pay a stipulated sum, in proportion to the work done by the employee, this creates no implied obligation to pay the employee for the time that he is idle, or to furnish him with work.<sup>2</sup> But although the employee cannot compel the employer to furnish him with work, or pay him for the time that he was idle, where he was only to be paid in proportion to the work that he performed, still the courts would be disposed to imply an agreement on the part of the employer to furnish the employee with work whenever that would be essential to enable the employee to earn his wages;<sup>3</sup> and while a

U. S. 213; *Nelson v. Minona & Co.*, 33 N. W. Rep. 908. But an employer is not liable for possible dangers, after knowledge by the employee. *Harris Dam. by Cor.*, § 511, p. 608; *Drew v. Gaylord Coal Co. (Pa.)*, 8 Cent. Rep. 389.

<sup>1</sup> *Pennsylvania Co. v. Dolan (Ind. App.)*, 32 N. E. Rep. 802; *Fisher v. Manual*, 48 N. Y. S. R. 510; 51 N. Y. S. R. 494. But as to the reciprocal duty on the part of the employee, see *Stix v. Raulston*, 88 Ga. 743.

<sup>2</sup> Such would be a contract of employment by the month, even though the services lasted for over a year. *Capron v. Strout*, 11 Nev. 304. And in such case the employer need not specify the reasons for discharge of the employee. *Ball v. Livonig Salt & Min. Co.*, 59 N. Y. S. R. 286; *Whittle v. Frankland*, 2 B. & S. 49; *Mor. Min. Rep.*; *Fulger v. Koch & Co.*, 18 Mo. App. 310.

<sup>3</sup> And this is particularly true when the employment is for a definite period. *Lewis v. Atlas & Co.*, 61 Mo. 534; *Beggs v. Fowler*, 83 Mo. 599. But the employee must show his readiness to perform the service. *Cramer v. Mack*, 8 Mo. App. 531. Nor can he quit until the expiration of the whole period and then recover for same. *Stone v. Vimont*, 7 Mo. App. 277. The following cases recognize the employee's right to recover for a wrongful discharge: *Allen v. Colliery Co.*, 196 Pa. St. 512; *Lindell v. Chidestell*, 84 Ala. 510; *Glasgow v. Hood (Tenn. 1900)*,

mine owner can refuse to pay an employee for the time that he was idle, when by the contract of hiring he was only to be paid in proportion to the work performed by him,<sup>1</sup> if the employee is engaged for a definite period, although the employer can close down his business whenever he desires, he cannot deduct from the employee's wages for the time that he was idle, even though it would have been impracticable for the mine owner to continue with the work.<sup>2</sup> Where the contract is for a certain time, irrespective of any conditions as to work, if the employer should refuse to pay the employee, according to the contract, or for the work he had performed, the employee has either one of two remedies by which to recover the same, i. e., he can bring an action on the contract and sue in damages for the breach; or treat the contract as rescinded and sue upon a *quantum meruit* for the value of the work and labor done.<sup>3</sup>

§ 388. *Wages — How paid* — It is generally supposed that a laborer not only has a prior lien for the services performed by him — which in the absence of a statutory provision is a very erroneous opinion — but that on account

57 S. W. Rep. 162; *Saxonia Min. Co. v. Cook*, 7 Colo. 569; *Beck v. Thompson Co.*, 108 Ga., 242; *Hansard v. Menderson Co.*, 73 Mo. App. 584; *Lichenstein v. Brooks*, 75 Tex. 196; 20 Am. & Eng. Enc. Law (2 Ed.) 26. Unprovoked insolence to the employer by the employee will justify his discharge. *Darst v. Alkali Works*, 81 Fed. Rep. 224; *Jordan v. Webber Co.*, 72 Mo. App. 325; *Beach v. Mullin*, 34 N. J. L. 343. But see *Suttle v. Aloe*, 39 Mo. App. 38; *Wilke v. Harrison*, 166 Pa. St. 202; 20 Am. & Eng. Enc. Law (2 Ed.), 28.

<sup>1</sup> *Capron v. Strout*, 11 Nev. 304; *Whittle v. Frankland*, 2 B. & S. 49, cited *supra*.

<sup>2</sup> *Isaacs v. McAndrew*, 1 Mont. 437. But if no time for payment was named, an action would not lie until expiration of the period. *Idem.* *Isaacs v. McAndrew*, 9 M. M. R. 690.

<sup>3</sup> *Halsey v. Melnroth*, 54 Mo. App. 335; *Ehrlich v. Aetna & Co.*, 88 Mo. 249; *Kirk v. Hartman*, 11 Mor. Min. Rep. 450.

of the peculiar character of the debt it is the next thing to an impossibility for an employer to avoid the obligation to pay the employee for his services. This opinion is perhaps correct where there is an obligation to pay on the part of the employer,<sup>1</sup> but the truth of the matter is that services, like everything else of value, can be the subject of donation,<sup>2</sup> and unless there is some evidence of an express or implied contract on the part of the employer, to pay the employee for the work performed, the employee cannot recover from the employer for the rendition of such services.<sup>3</sup> And while the employee can recover for his services, when there is a contract on the part of the employer to pay him for the same,<sup>4</sup> or recover the value of his services on a

<sup>1</sup> See authorities cited under the previous section entitled "Contract of Hiring."

<sup>2</sup> "The law does not compel a party to be benefited against his will." *Price v. St. L. & Co. Co.*, 8 Mo. App. 262; *Coleman v. Roberts*, 1 Mo. 97. An employee who quits the service before the expiration of the period he contracted to remain, forfeits his right to all wages due. *Blanton v. King*, 73 Mo. App. 148; *Paul v. Min. Co.*, 89 Mo. App. 647; *Naylor v. Falls River Iron Co.*, 118 Mass. 317; *Tennessee Co. v. James*, 91 Tenn. 154; *Allen v. Aylesworth*, 58 N. J. Eq. 349. But only slight evidence of waiver is necessary. *Hogan v. Titlow*, 14 Cal. 255. Where the employee's wages are dependent on the profits of the business, he is restricted to profits earned during the period of service. *Penston v. Huber Co.*, 196 Pa. St. 580; *McDonald v. Buckstaff*, 56 Neb. 88. See also *Marks v. Davis*, 72 Mo. App. 557; *Lowery v. Prospecting Co.*, 65 Mo. App. 266. "A party who is employed under a written contract as a superintendent of mines for five years at a salary of \$4,000 per year, but in which no time for its payment is fixed, must perform services for the period of five years, before he can bring an action for any part of his salary." *Isaacs v. McAndrew*, 1 Mont. 437.

<sup>3</sup> The law will not imply a promise to pay for services where there is no request or acceptance of the benefit of such service. *Mansur v. Murphy*, 49 Mo. App. 266; *Helmenz v. Goerger*, 51 Mo. App. 586; *Lynch v. Bogy*, 19 Mo. 170. And the mere fact that the service was known and was beneficial will not create a liability therefor. *Helmenz v. Goerger*, *supra*.

<sup>4</sup> *Moss v. Dec. Land Imp. Co. (Ala.)*, 9 So. Rep. 188. And continu-

*quantum meruit*, when the services are received by him or the contract is ratified by the employer;<sup>1</sup> yet an employee cannot recover additional remuneration, merely because he has performed more services than contracted for, unless there is an obligation on the part of the employer to pay him additionally for the extra services performed.<sup>2</sup> But one who is employed for a certain length of time, if authorized to perform work beyond the general scope of his employment, may recover from the employer for the services so performed, even though there was no agreement to pay therefor, if the work performed was expressly authorized by the employer.<sup>4</sup> Except where the employee is prevented from completing his contract by the act of God, the public enemy, the law, or the employer, he cannot recover under an entire contract, until he can show a full performance of the same,<sup>4</sup> but unless the services are performed under an entire contract, the full performance of the contract would not be necessary before the employee could recover, for he is entitled to remuneration, even though he has only partially bestowed the services stipulated for.<sup>5</sup>

ing after expiration of contract is presumed to be at same wages. *In-galls v. Allen*, 88 Ill. App. 458; *Adams v. Fitzpatrick*, 125 N. Y. 124. But no services can be recovered from a mine owner for work rendered his independent contractor. *Fairfield v. Wyoming &c. Coal Co.*, 21 Atl. B. 874.

<sup>1</sup> In such case a recovery can be had regardless of whether the service was of value. *Mooney v. York Iron Co.*, 82 Mich. 263.

<sup>2</sup> *Bartlett v. Grand Rapids &c. Co.*, 82 Mich. 658.

<sup>3</sup> *Singer &c. Co. v. Rohn*, 132 U. S. 518; 33 L. Ed. 440; 10 Sup. Ct. Rep. 175; *Thompson v. Detroit &c. Copper Co.*, 80 Mich. 422.

<sup>4</sup> Nor in *indebitatus assumpsit*. *St. Joe Iron Co. v. Halverson*, 48 Mo. App. 883. And see, as to necessity for performance, generally, *Bish. Con.*, §§ 577-609, and cases cited.

<sup>5</sup> *Yates v. Ballentine*, 56 Mo. 530; *Williams v. Porter*, 51 Mo. 441. In many mining States statutes have been passed regulating the time and manner of payment of mine employees, and prescribing penalties for

§ 389. **Owner should furnish safe machinery.** — In all vocations where machinery is in use and which are attendant with any risk, the owner or employer is responsible for any injury that an employee may receive by reason of the

violations thereof, but such statutes are held unconstitutional by the courts, especially when they go to the extreme adopted by the Missouri legislature, where all contracts of mine employees are made void unless by the terms thereof they are to be paid at least every fifteen days, and all mine employers failing to pay their employees according to the terms of the statute are made liable in double the sum due, for such statutes, aside from being unreasonable discriminations in the way of legislative tutelage, are manifest limitations upon the citizen's right to contract. See *State v. Loomis*, 115 Mo. 307; *State v. Goodwill*, 38 W. Va. 179-188. See *Laws Mo.* for 1891, p. 188. See the late case of *Braceville Coal Co. v. People* (Ill.), 87 C. L. J. 409; also *Frorer Case*, 81 N. E. 395. And for full discussion of the question, and collection of authorities, see 87 C. L. J. 409; *Millett v. People*, 117 Ill. 294; 7 N. E. 631; distinguished, *Ramsey v. People*, 32 N. E. 364; *Frorer v. Same*, 366. *Contra*, *Hancock v. Yaden*, 87 C. L. J. 409, and cases cited. But see paper of J. F. Mister before Mo. St. Bar Assn. at Springfield, Mo., July 10, 1894, for full and learned discussion of "State's Regulation of Contract of Employment." Proc. 16 Am. Meet., p. 222: "In *Knoxville Iron Company v. Harbison*, 133 U. S. 13, it was held that an act of the legislature of the State of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees, does not conflict with any provisions of the Constitution of the United States relating to contracts. The court quotes extensively from the opinion of the State court sustaining the validity of this enactment, and thereupon adds: 'The Supreme Court of Tennessee justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground. It will be sufficient to briefly notice two or three of the latest cases: In *Holden v. Hardy*, 169 U. S. 360, the validity of an act of the State of Utah, regulating the employment of workingmen in underground mines and fixing the period of employment at eight hours per day, was in question. It was contended that the legislation deprived the employers and employees of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws, abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process of law.

inferiority or defectiveness of the machinery,<sup>1</sup> and as mining operations are accomplished with great risk and peril to those conducting the business, independent of statutory liability, the legal responsibility of the mine owner should be all the greater for injuries to the employees which occur by reason of defective or inferior machinery.<sup>2</sup> The mine

But it was held, after full review of the previous cases, that the act in question was a valid exercise of the police power of the State, and the judgment of the Supreme Court of Utah sustaining the legislation was affirmed.''' For interesting discussion on the right of States to regulate the relations of mine owner and employee, on grounds of public necessity, see article of R. M. Benjamin, prompted by coal strike of September, 1902, in 6 Law Notes, 120. The Illinois statute, making employer pay wages according to tons of coal mined, was held unconstitutional. *Millett v. People*, 117 Ill. 294; *Harding v. People*, 160 Ill. 459. But the Indiana and West Virginia statutes have been upheld. *State v. Pasco*, 158 Ind. 214; *Martin v. State*, 148 Ind. 545; *State v. Peel Splint Coal Co.*, 86 W. Va. 802. Some of the State statutes limiting the hours of service by employees, have been upheld. *Holden v. Hardy*, 169 U. S. 369; *s. c.* 14 Utah, 71; *Short v. Bullion-Beck Min. Co.*, 20 Utah, 20; *U. S. v. Bridge Co.*, 88 Fed. Rep. 895; *Schurr v. Savigny*, 85 Mich. 144; *Drake v. State*, 144 N. Y. 416. But see *State v. Moors*, 55 Neb. 495; 20 Am. & Eng. Enc. Law (2 Ed.), 58 *et sub.*

<sup>1</sup> *Cooley on Torts*, pp. 650-659 *et sub.* And if the employer knowingly uses defective appliances he is liable. *Perry v. Ricketts*, 55 Ill. 234.

<sup>2</sup> *Cambria Iron Co. v. Schaffer* (Pa.), 6 Cent. 608. The degree of care exacted of an employer differs with the hazards of the employment. *Frihoy v. Brooklyn Min. Lead Co.*, 4 Utah, 468; 11 Pac. Rep. 612. The following additional cases recognize the duty of employer to furnish safe machinery and appliances, or such as is reasonably safe: *Purcell Mill & Co. v. Kirkland*, 47 S. W. Rep. 311; *Romona Stone Co. v. Johnson*, 6 Ind. App. 550; *Con. Coal Co. v. Bonner*, 43 Ill. App. 17; *N. Y. Min. Syndicate v. Rogers*, 11 Colo. 6; *Hamilton v. Rich Hill Coal Co.*, 108 Mo. 364; *Lehigh Coal Co. v. Hayes*, 128 Pa. St. 294; *Carter v. Oil Co.*, 34 S. Car. 211; *Virginia & Co. v. Chalkly*, 98 Va. 62; 20 Am. & Eng. Enc. Law. (2 Ed.) 73. For negligence of employer from violation of statute, see *Howells v. Wynn*, 15 C. B. (N. S.) 8; *Foster v. Mining Co.*, 1 Q. B. 71; *Kearney v. Whitehaven Co.*, 1 Q. B. 700; *s. c.* 62 L. J. M. C. 129; *Catlett v. Young*, 143 I l. 74; *Pawnee Coal Co. v. Royce*, 184 Ill. 402; *Spring-side Coal Co. v. Grogan*, 53 Ill. App. 60; *Fell v. Rich Hill Co.*, 23 Mo. App. 216; *Leslie v. Rich Hill Co.*, 110 Mo. 81; *Durant v. Coal Co.*,

owner is generally liable for any injury that a miner may receive while engaged in the mining operations, or work pertaining to the same, which is caused by reason of inferior or defective machinery, and to which the latter had not contributed by his own negligence.<sup>1</sup> And while a mine employee may, after a certain length of time, be held to have waived the defects in the machinery employed in operating the mine,<sup>2</sup> he cannot be held to have waived his right to claim damages for any injury caused by reason of defective machinery before he has been employed for a length of time sufficient to enable him to become acquainted with the defects,<sup>3</sup> nor can a miner be held to have waived defects in the construction of a mine, by continuing to work therein until he has had reasonable time and opportunity to become acquainted with the defects, and with their bearing upon the hazards of his employment.<sup>4</sup> But the employer is not an insurer against accidents resulting

97 Mo. 62; *State v. Anaconda Copper Co.*, 23 Mont. 498; *Durkin v. Kingston Co.*, 171 Pa. St. 193; 20 Am. & Eng. Enc., p. 789; *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248.

<sup>1</sup> *Hamilton v. Rich Hill Mining Co.*, 108 Mo. 364; *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 31.

<sup>2</sup> *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 366; *Bering v. Medart*, 56 Mo. App. 443.

<sup>3</sup> *Perry v. Rickards*, 55 Ill. 234.

<sup>4</sup> *Crabeth v. Wapello Coal Co.*, 68 Iowa, 751. Independent of the employer's statutory duty the employee is warranted in acting on the assumption that the machinery used by the employer is reasonably safe and adapted to the service in which it is engaged and the rule that the employee may assume that his employer has furnished him with suitable and safe appliances is particularly applicable where the duties of the employee require his close and constant attention to other matters; but generally before an employee can recover for injuries resulting from defective machinery and appliances, the employer must know or it must have been his duty to know of the defect, and the employee must have been ignorant thereof or not possessed of equal means of knowledge with the employer. *Humphries v. Newport & Co.*, 33 W. Va. 135; *Dutzi v. Gelsel*, 23 Mo. App. 676; *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446. In most mining States statutes had been passed



from defective machinery; nor would the proof of a latent defect in the machinery establish a *prima facie* case on the part of the employee;<sup>1</sup> however, the employer is gene-

requiring safe machinery. It has, for years, been contended by lawyers of the zinc region of Missouri, that the act requiring cages in mines, only extended to coal mines (see Sess. Laws Mo. 1901, p. 211). Briefly stated some of the reasons are: "Words in a statute are construed according to their meaning at time of the passage of the act; there is no presumption that an enlarged meaning was intended by a re-enactment of the statute" (28 App. 169); as this act was originally passed the title of the act and language of the section plainly restricted its meaning to "coal mines." (Laws '81, p. 167). In '87 the word "coal" was omitted, but the proviso excepted "coal mines" of a certain depth, or all less than 100 ft. and in '99 "all coal mines less than 100" ft. were exempted and the same was practically re-enacted in 1901. It would be unreasonable to suppose that *all lead and zinc* mines, of any and all depths were required to cage and only coal mines — *over 100 ft.* were subject to the act — yet this is the only construction to place upon it if lead and zinc mines are subject to the operation of the law, as only "coal mines" are mentioned as the exception to the mines subject to the act. It is impossible for all lead and zinc mines to comply with the act without great inconvenience and expense and it would practically ruin the lead and zinc industry to so hold. "Statutes should be construed according to reason and common sense" (47 App. 624); "in construing a statute it is proper to consider the effects and consequences of a given interpretation" (111 Mo. 45); "a penal act must be so construed as that no case will fall within it, which is not included within the reasonable meaning of its terms and the spirit and scope of its enactment" (108 Mo. 459). "No person is made subject to a penal statute by implication" (90 Mo. 534); and it is competent, in construing a given law, to accept proof of the general understanding of the law; the constant practice of those whose duty it is to enforce it and their interpretation unquestioned by any public or private act is strong, if not conclusive evidence of the given interpretation upon the courts (112 Mo. 103; 111 Mo. 18). The statute makes it the duty of mine inspectors to see to the enforcement of this statute and they hold universally, that it *does not apply* to lead and zinc mines (see report State Mine Inspector for Mo. for 1897, pp. 180 and 181, where it is stated that the acts requiring machinery and appliances were intended to apply only to coal mines). But see *Hammon v. Coal Co.*, 166 Mo. 240, where the above considerations were not called to the court's attention.

<sup>1</sup> *O'Donnell v. Brown*, 38 Mo. App. 245. Nor would the fact that the

rally liable for injuries resulting from defects in machinery of which he might have known by the exercise of ordinary care,<sup>1</sup> although he cannot be considered guilty of a breach of duty when he provides such machinery as would be fairly and reasonably safe, even though it may not be the best and latest machinery that could be obtained, if it could be used without danger to the employee.<sup>2</sup>

§ 390. Should furnish suitable employees.— When one undertakes and enters into a dangerous employment, he not only assumes the peril immediately incident to the particular business, but he also takes upon himself the risks arising from the negligence of his fellow-employees,<sup>3</sup> and where one has voluntarily entered into a dangerous business he should not afterwards complain because of the exceptional risks assumed.<sup>4</sup> But while an employee assumes the risks incident to his duties in the service, upon which he has entered, he still has the right to expect that the employer will protect him from risk as far as he can, by selecting for his associates people of ordi-

defect was discovered and remedied by the master after injury to the servant, constitute evidence of such negligence. *Ante, idem.*

<sup>1</sup> *Washington &c. Co. v. McDade*, 135 U. S. 554; 18 Wash. Law Rep. 526; *Hoffam v. Dickinson*, 31 W. Va. 112; 6 S. E. Rep. 53; *Kaspari v. Marsh*, 74 Wis. 562.

<sup>2</sup> *Lehigh &c. W. Coal Co. v. Hayes*, 128 Pa. St. 294; 5 L. R. A. 441; 18 Atl. Rep. 387; *Galveston &c. Co. v. Fassett*, 73 Tex. 262; *Conway v. Hannibal & St. Joe Rv. Co.*, 24 Mo. App. 235.

<sup>3</sup> *McLean v. Blue Point G. M. Co.*, 51 Cal. 255. As to what constitutes fellow-servants, see *Daniels v. Mo. P. Ry. Co.*, 23 Pac. Rep. 762, and note; mere co-operation and community of labor, without a common master, will not constitute. *U. P. R. Co. v. Billeter*, 40 Am. & Eng. Ry. Cas. 431; 44 N. W. Rep. 483; *contra*, *Corbett v. St. L., I. M. & S. Ry.*, 26 M. A. 621.

<sup>4</sup> *Deering on Negligence*, § 201 and cases cited; *Woodward Iron Co. v. Jones* (Sup. Ct. Ala.), 23 C. L. J. 296.

nary skill and prudence in that particular vocation.<sup>1</sup> The liability of the employer for an injury resulting from a failure to employ suitable employees is just as great as an injury resulting from a failure to provide suitable machinery for his employees,<sup>2</sup> and as in the case of a failure to provide the necessary machinery for the business, the owner's responsibility may either arise from a failure to employ persons who have the required skill or prudence to attend to the business intrusted to them, or in allowing persons to continue in his employ when he has discovered they are unfit or incompetent to properly discharge the duties of their employment;<sup>3</sup> or even if he has not had actual knowledge of their incompetency, if he could have discovered the same by the exercise of reasonable diligence, the continuance of such persons in his employ is considered just as much a breach of duty by the owner as though he had employed an incompetent servant from the first.<sup>4</sup> But negligence must first be brought home to the

<sup>1</sup> The master is responsible to a servant for the negligence of a fellow-servant, whenever his own negligence contributes to the injury, or where the other servant occupies such a relation to the injured party, or to the employment in which the injury was received, as to make the negligence of such servant the negligence of the master. *Myers v. Hudson Iron Co.*, 150 Mass. 125; *Quebec &c. Co. v. Merchant*, 133 U. S. 375. Nor would the contributory negligence of a fellow-servant prevent a recovery by the injured party. *Hume v. Michigan C. R. Co.*, 78 Mich. 513; 41 Am. & Eng. Ry. Cas. 452; 44 N. W. R. 502; *Myers v. Hudson Iron Co.*, *supra*. But see *Whittaker v. Delaware &c. Canal Co.*, 49 Hun, 400.

<sup>2</sup> *Myers v. Hudson Iron Co.*, 150 Mass. 125; 22 N. E. Rep. 631; *Moran v. Brown*, 29 Mo. App. 487; *Carr v. North River Can. Co.*, 48 Hun, 266; 17 N. Y. S. R. 945; *Hanley v. Grand Trunk Ry. Co.*, 62 N. H. 274; *Worheld v. Mo. &c. Co.*, 32 Mo. App. 367.

<sup>3</sup> *Consolidated Coal Co. v. Wombacker*, 24 N. E. Rep. 627; *Wood on Master & Serv.* 86, and cases cited; *Hough v. Railroad*, 10 U. S. 213; *Granville v. Id.*, 10 Fed. Rep. 711

<sup>4</sup> *Anglo-American C. v. Lewondowski*, 26 Ill. App. 487; *Quebec Co. v. Merchant*, 133 U. S. 375; 7 R. R. & Corp. L. J. 432; *Norfolk &c. Co. v.*

master in order to hold him responsible for an injury resulting from the negligence of a fellow-servant of the injured party, and unless it be shown that he was guilty of negligence in selecting his servants, or in retaining those who were unfit to remain in his employment, he cannot, generally, be held responsible for such an injury.<sup>1</sup>

§ 391. Same — Negligence of fellow-servants. — It has already been seen that in entering upon an employment the employee assumes the risk of injuries from his fellow-employee's negligence as well as the dangers resulting from his surroundings alone,<sup>2</sup> and for an injury from a fellow-employee's negligence, if not himself guilty of negligence, an employer is not responsible.<sup>3</sup> This rule, however, is subject to certain limitations, and in law or good conscience an employer cannot relieve himself from every injury and the resulting liability from the act of a co-employee, and if the employee is injured by the negligence of a superior, or an employee serving in a distinct department of the employ-

Hoover, 78 Neb. 263; 29 Atl. Rep. 994; *Myers v. Hudson Iron Co.*, *supra*.

<sup>1</sup> *McGovern v. Columbia Mfg. Co.*, 80 Ga. 227; *Moran v. Brown*, 27 Mo. App. 487. And where the injury results solely from the negligence of a fellow-servant, the master cannot be held responsible for such injury (*Riley v. O'Brien*, 58 Hun, 147; 6 N. Y. Supp. 129), unless the same resulted from the exercise of authority which the master had conferred upon such fellow-servant over the injured party; or unless the negligence of the fellow-servant consisted in a breach of duty, which the law imposed upon the master himself, in which case he could be held responsible to the injured party the same as though the injury resulted from his own negligence. *Consolidated Coal Co. v. Wombarber*, 24 N. E. Rep. 627; *Dutzi v. Geisel*, 23 Mo. App. 676

<sup>2</sup> *Ante*. See section preceding.

<sup>3</sup> *Strahlendorf v. Rosenthal*, 10 Mor. Min. Rep. 676; *Kelly v. Belcher Co.*, 10 Mor Min. Rep. 3.

er's service, the latter is liable for the injury.<sup>1</sup> But in some of the States there is no distinction recognized between injuries from co-employees, whether in the same or different grades of the same employment, or that the employee whose act occasioned the injury may have been the injured man's superior; the master is, in all such cases, relieved of liability,<sup>2</sup> but only where this rule obtains it is held necessary that the employees should both have been employed to effect the same common object.<sup>3</sup> If their employment was for distinct and entirely different purposes then the rule would not apply.<sup>4</sup>

§ 392. Same — Who are fellow-servants in a mine. — As a general rule, all those engaged in the common employment of removing ore from a mine, whether engaged in cutting down or wheeling out the ore, are fellow-servants, for the acts of whom the master is not responsible to those engaged in the same line of employment.<sup>5</sup> In order to constitute them fellow-servants, within this rule, it is not necessary that the injured employee and the one causing the injury should both be engaged in the same particular work; but if they are engaged by a common employer in a common work, with the same gen-

<sup>1</sup> *Kielly v. Belcher Co.*, *supra*; *Ordesco Co. v. Gibson*, 10 Mor. Min. Rep. 669.

<sup>2</sup> *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware Co. v. Carroll*, 10 Mor. Min. Rep. 47. This is the construction placed on the California Code. *McLean v. Blue Point Gravel Mining Co.*, 51 Cal. 255; 10 Mor. Min. Rep. 22.

<sup>3</sup> *Lehigh Valley Co. v. Jones*, *supra*. But see *Chicago & c. Co. v. Ross*, 112 U. S. 377; *Brothers v. Carter*, 52 Mo. 373.

<sup>4</sup> Authorities, *supra*.

<sup>5</sup> *Wood v. New Bedford Coal Co.*, 121 Mass. 252; 2 Thomp. on Neg. 1034; *Kielly v. Belcher Sil. Min. Co.*, 3 Sawyer (U. S.) 500; *Pittsburg & c. Co. v. Sentmeyer*, 92 Pa. St. 276.

eral object in view, then they are fellow-servants.<sup>1</sup> But in most of the States to constitute co-employees fellow-servants they must be both serving in the same department of the master's business and one not inferior in authority to the other,<sup>2</sup> and ordinarily those engaged in distinct departments of the master's general business or in inferior and superior positions, are not regarded as fellow-servants.<sup>3</sup> This general rule, however, is subject to the exceptions made by different decisions in the different States. For instance, in Ohio, a foreman in charge of hands, has been held *not* to be a fellow-servant,<sup>4</sup> while in Pennsylvania, an overseer has been held a fellow-servant with a workman.<sup>5</sup> So, in the latter State, a "driver boss" and a "mining boss" have been held to be fellow-servants;<sup>6</sup> and a "mining boss" and a workman;<sup>7</sup> but in some others still a different rule obtains,<sup>8</sup> and

<sup>1</sup> Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Delaware & Hudson Canal Co. v. Carroll, 89 Pa. St. 374; McLean v. Blue Point Co., 10 Mor. Min. Rep. 22. "The man who lets down the miners into the mine is a fellow-laborer with the miners, within the rule as to injuries from fellow-laborer's negligence." Bartonshill C. Co. v. Reid, 8 Macq. 266; S. P. Bartonshill C. Co. v. McGuire, 8 *Id.* 300 (Scotch cases); M. M. D., p. 223. In Alaska Treadwell Gold Min. Co. v. Whelan (168 U. S. 86; 42 L. Ed. 390) it is held that a ground foreman is a fellow-servant, if he works with the employees, regardless of his power to employ and discharge the men. See also Glover v. K. C., B. & N. Co., 158 Mo. 327. And for case abolishing the "department doctrine," in Missouri, see Grattis v. K. C., P. & G. Co., 158 Mo. 380; 55 S. W. Rep. 108.

<sup>2</sup> Kielly v. Belcher Co., 10 Mor. Min. Rep. 11; Strahlendorf v. Rosenthal, *idem*, 676.

<sup>3</sup> Berea Stone Co. v. Kraft, 10 M. M. R. 16. But see, *contra*, McLean v. Blue Point Co., 10 M. M. R. 22 and cases cited. Alaska Gold Min. Co. v. Whelan, 168 U. S. 86; Grattis v. R. R., 158 Mo. 380.

<sup>4</sup> Berea Stone Co. v. Kraft, *supra*. And the same thing has been held in Michigan. Ryan v. Bageley, 50 Mich. 179. See also Little Miami & C. Co. v. Stevens, 20 Ohio, 415.

<sup>5</sup> Lehigh Valley Co. v. Jones, 10 M. M. R. 30.

<sup>6</sup> *Ante, idem*. But see Brothers v. Carter, 52 Mo. 372.

<sup>7</sup> Delaware Co. v. Carroll, 10 Mor. Min. Rep. 47.

<sup>8</sup> Ardesco Co. v. Gilson, 10 Mor. Min. Rep. 669. Kielly v. Belcher Co.,

thus, as in other doctrines, the opinions of different judges are found to be irreconcilable, and each gives reasons for his views, stronger to him, than the opposing argument of the adverse decision.

§ 393. *Same — Master acting as workman.* — The law, however, which exempts a master from liability for injuries resulting from the negligence of fellow-servants, does not relieve a master from liability, who himself takes part in the servant's work and while so engaged, injures him from his own neglect,<sup>1</sup> for this would permit him to do indirectly what he cannot do directly, *i. e.*, escape from the result of his own wrongful act. Accordingly, a master who injures an employee while engaged as a laborer can be made to respond in damages for the injury,<sup>2</sup> and if he is a member of a partnership by which the injured man is employed, and the work he has engaged in is within the scope of the firm's business, the firm could be held responsible for the injury resulting from the negligence of one of its members.<sup>3</sup> And the rule is the same as to the liability of the owner or master for the result of his negligence while he is engaged as manager or superintendent of his own mining operations, and for all injuries that can be approximately traced to his negligence while so acting, he is responsible.<sup>4</sup> And a master is ordinarily liable for all acts resulting from his personal interference and negligence where he

10 Mor. Min. Rep. 11. Foreman is held by U. S. Supreme Court to be a fellow-servant, if he works with the employees. *Alaska Gold Min. Co. v. Whelan*, 168 U. S. 85.

<sup>1</sup> *Ashworth v. Stanwix et al.*, 3 E. & E. 701; 9 Mor. Min. Rep. 674; *s. c.* 84 L. J. Q. B. 188; M. M. D. 223.

<sup>2</sup> *Ante, idem*. A clear and able opinion.

<sup>3</sup> *Douty v. Bird*, 60 Pa. St. 48; *Moreton v. Harden*, 4 B. & C. 223; *Ashworth v. Stanwix, supra*.

<sup>4</sup> *Mellors v. Shaw et al.*, 1 B. & S. 487; 9 M. M. R. 678; *Hall v. Johnson*, 9 Mor. Min. Rep. 684; 34 L. J. Ex. 222.

engages in work or is guilty of negligence in the selection of employees.<sup>1</sup> But a manager, steward or agent, who has no interest in the master's business as such, is not ordinarily liable for damage done by the negligence of those employed by him in the service of his principal, but only the principal and those guilty of the wrongful act are liable.<sup>2</sup>

§ 394. *Acts of independent contractor.* — A mining company is not generally responsible for injuries resulting from the negligence of independent contractors, who are not in the immediate employment of such company, and the same rule applies whether the negligence results from defective machinery, unskillful servants or otherwise, so long as the injury results from some act, or a failure to act, upon the part of the contractor.<sup>3</sup> In order to charge one person for an injury resulting from the tort of another, it is necessary to show some connection between the two; that the person sought to be charged was the employer, or that the party occasioning the injury was subject to immediate direction and control of such person, and no liability could result where the party occasioning the injury was exercising an independent business of his own.<sup>4</sup> But if the mining company could be considered as the employers of the party in charge of the mine and the parties in charge as representing them in such capacity,

<sup>1</sup> *Roberts v. Smith*, 2 H. & N. 213; *Priestly v. Fowler*, 3 M. & W. 1.

<sup>2</sup> *Stone v. Cartwright*, 9 Mor. Min. Rep. 672; *Stockbridge Co. v. Cone Iron Works*, 6 Mor. Min. Rep. 317; 102 Mass. 80; *Wright v. Compton*, 2 M. M. R. 189; 53 Ind. 337.

<sup>3</sup> *Harrison v. Kiser*, 79 Ga. 588; *Miller v. Minn. & C. Co.*, 76 Iowa, 655; *Gas Co. v. Waters*, 123 Pa. 320.

<sup>4</sup> So an employee, in a shaft under the construction of independent contractors, could not recover from the mine owners for an injury resulting from the breaking of a rope, or other unsafe appliances. *Leudberg v. Brotherton Iron Min. Co.*, 75 Mich. 84; 42 N. W. Rep. 675.



there is no doubt but what such company could be held responsible for injuries resulting from the negligence of the party in charge.<sup>1</sup> And if the injury results from the negligence of one occupying the position of foreman of the mine, the company could not escape liability, either on the theory that he was an independent contractor, or that he was the fellow-servant of the injured employee, for the negligence of such employee would be considered the negligence of the company.<sup>2</sup> And even though the relation of master and servant was not clearly shown to exist, between the company and the party in charge of the mine, if full knowledge of the negligence of the party in charge, which was the approximate cause of the injury, could be brought home to the company, it is very doubtful if the law would not hold them for the consequences of such negligence.<sup>3</sup>

**§ 395. Owner should furnish means of ingress and egress.** — It is one of the fundamental duties incumbent upon the mine owner to furnish suitable and safe means of

<sup>1</sup> *Chicago, B. & Q. R. Co. v. Clark*, 42 N. W. Rep. 703; *Woodman v. Metropolitan &c. Co.*, 149 Mass. 335; *Montgomery Gas Co. v. Montgomery & E. Ry. Co.*, 86 Ala. 372; 5 So. Rep. 735.

<sup>2</sup> *Kelly v. Cable Company*, 7 Mont. 70; 14 Pac. Rep. 633. And an owner who has engaged another to open his mine, reserving the right to furnish machinery, would be liable to an employee for an injury from a failure to furnish safe machinery, notwithstanding the independent contract. *Fell v. Coal Min. Co.*, 23 Mo. App. 216.

<sup>3</sup> *Chartiers Valley Gas Co. v. Waters*, 19 Pitts. Leg. J. (N. S.) 235; 23 W. N. C. 175; 16 Atl. Rep. 423; 23 Pac. Rep. 220; 46 Phil. Leg. Int. 169. And so if the work or the premises were so dangerous as to amount to a nuisance (*Crenshaw v. Ullman*, 113 Mo. 633), or if the contractor is known to be irresponsible, incompetent or negligent (*Brannock v. Ellmore*, 114 Mo. 55). If the owner personally interferes (*Long v. Moon*, 107 Mo. 334), or retains a supervision of and furnishes the means for accomplishing the work; — in all these cases the owner is liable, and the rule as to independent contractors does not apply. *Burns v. McDonald*, 57 Mo. App. 599; *Roddy v. Mo. Pac.*, 104 Mo. 234.

ingress and egress for those whom he has employed to labor in his mine.<sup>1</sup> The statutes of many of the mining States provide for the kind of machinery to be used and the manner in which the different mining operations shall be conducted,<sup>2</sup> and as these statutes are usually mandatory, the mine owners are generally responsible for any injury which an employee may receive when there has not been a strict or substantial compliance with the provisions of the statute governing that particular kind and character of mining operations.<sup>3</sup> In an action under such a statute, for an injury to an employee by reason of the neglect of the mine owner or operator, the question to be determined is whether the requirements of the statute have been complied with and, if not, whether the injury complained of was occasioned by the failure of the owner to comply with the provisions of the statute. If the negligence of the owner is the approximate cause of the injury complained of, while the statute does not exempt an employee from the direct and immediate consequences of his own carelessness,<sup>4</sup> the mine owner would generally be held responsible for the injury.<sup>5</sup> But where the statute provides for the secu-

<sup>1</sup> *Cambria Iron Co. v. Schaffer* (Pa.), 6 Cent. 608; *Blanchard & Weeks* Ld. Cas., p. 632, and cases cited.

<sup>2</sup> See statutes different States, Vol. II.; R. S. Mo. 1899; Laws Mo. 1901, p. 211.

<sup>3</sup> *Spiva v. Osage Coal & Mining Company*, 88 Mo. 68; *Blan. & Weeks* Ld. Cas., p. 633, citing Civil Code California. "Master who lets the workman down his mine is bound to bring him up safely, even though he come up on his own business, and not for that of his master." *Brydon v. Stewart*, 2 Macqueen Sc. App. 30; M. M. D. 243.

<sup>4</sup> *Blanchard & Weeks*, p. 633 and cases cited; *Finlayson v. Utica Min. & M. Co.*, 67 Fed. Rep. 507; *Adams v. Mining Co.*, 85 Mo. App. 486.

<sup>5</sup> *Caldwell v. Brown*, 53 Pa. St. 458; *Smith on Master & Servant*, 134; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Durant v. Lexington Coal Co.* 97 Mo. 62; *Harris Dam. by Cor.*, § 988, p. 1140. As to duty to maintain

rity and safety of mine employees, by requiring the employment of a practical and skilled inside overseer or "mining boss," if the mine owner has complied fully with the provisions of the statute, he will not be liable in damages to an employee for an injury caused by the negligence of the overseer of the mine, for the injury could not be attributed proximately to the negligence of the mine owner, and where he had complied fully with the provisions of the statute, he would not, in law, be deemed guilty of any negligence.<sup>1</sup>

§ 396. **Duty as regards place of working.** — The employer is also liable to the employee for an injury resulting from the dangerous nature of the place where the employee is at work, and the employer cannot relieve himself from the liability resulting from such an injury, by delegating to another the duty which the law places on him of providing a safe place.<sup>2</sup> The employer has been held liable for an injury caused from falling earth, where the defective condition of the ground was known to him;<sup>3</sup> for an injury from a cave-in, caused by a failure to timber

safe means of ingress and egress, see *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Hamilton v. State*, 102 Ill. 367; *Chicago Coal Co. v. People*, 181 Ill. 270; *Haddock v. Com.*, 103 Pa. St. 243; *McDonald v. Rockhill Co.*, 135 Pa. St. 1; 20 Am. & Eng. Enc. Law, pp. 58, 59.

<sup>1</sup> *Waddell v. Simoson (Pa.)*, 3 Cent. 176. But, *contra*, see *Fell v. Coal Min. Co.*, 23 Mo. App. 216. And see, also, *Berea Stone Co. v. Kraft*, 10 Mor. Min. Rep. 16; *Ryan v. Bagley*, 50 Mich. 179; *Little Miami Co. v. Stevens*, 20 Ohio, 415. A statute which requires the owner of a mine to employ a "fire boss," to prevent injury from accumulated gas, does not preclude a recovery for the negligence of such "boss" so employed. *Schmalstieg v. Coal Co. (Kan. 1903)*, 59 L. R. A. 707; *Kless v. Coal Co. (Pa. 1902)*, 18 Pa. Sup. Ct. 551.

<sup>2</sup> *Consolidated Coal Co. v. Mombacker*, 134 Ill. 57; *Trihay v. Brooklyn Co.*, 15 Mor. M. R. 535; *Hammou v. Coal Co.*, 156 Mo. 232.

<sup>3</sup> *Strahlendorf v. Rosenthal*, 80 Wis. 674; *Harris Dam. by Cor.*, § 987, p. 1138; *Adams v. Min. Co.*, 85 Mo. App. 486.

and properly brace excavated portions of a mine;<sup>1</sup> also for an injury to an employee from a falling in of the roof of a drift where the evidence showed the employer's superintendent had known of the defect and directed the employee to work there;<sup>2</sup> and the employer has also been held responsible for an injury from the removal of a bulkhead, under the direction of his foreman, which permitted a column of earth it supported to fall.<sup>3</sup> But as a general rule a "mining boss" is held to be a fellow-servant with the employee and the employer is not, generally, held liable for injuries resulting from his negligence in having his men work in hazardous places;<sup>4</sup> nor would the employer be held responsible for an injury to an employee received at a place which has been rendered dangerous by such employee, or which is known by him to be defective, for, in voluntarily assuming the danger, he is guilty of such negligence as to prevent his recovery.<sup>5</sup> An employee cannot recover for an injury from a falling roof which he himself has failed to trim.<sup>6</sup> Nor could an employee recover for an injury from the falling of a side of a drift, which the foreman had tried to remove with a

<sup>1</sup> *Trihay v. Brooklyn Min. Co.* (Utah, 1886); *Mor. Min. Rep.*, Vol. 15, p. 535. For negligence from defective shaft, see *Strahlendorf v. Rosenthal*, 30 Wis. 675; *Adams v. Min. Co.*, *supra*.

<sup>2</sup> *Consolidated Coal Co. v. Wombacker*, 134 Ill. 57. See also *Bradley v. Ry. Co.*, 138 Mo. 298.

<sup>3</sup> *Gibson Car. Min. & Mill. Co. v. Sharp*, 38 Pac. Rep. 850.

<sup>4</sup> *Waddell v. Simonson*, 3 Cent. Rep. 176; 112 Pa. St. 567; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 482; *Delaware Canal Co. v. Carroll*, 89 Pa. St. 374; *Alaska Min. Co. v. Whelan*, 168 U. S. 86.

<sup>5</sup> *Money v. Lower Vein Coal Co.*, 55 Iowa, 671; *Harris Dam. by Cor.*, § 985, p. 1137; *Consolidated Coal Co. & Iron Co. v. Floyd*, 51 Ohio St. 542; 2 Ohio Leg. News, 75; 32 Ohio L. J. 355.

<sup>6</sup> *Pittsburg & W. Coal Co. v. Estieveward*, 33 Ohio, L. J. 277; 2 Ohio Leg. News. 510.

pick, the same having been displaced by such employee himself in drilling.<sup>1</sup>

§ 397. **Same — Liability for falling scales.** — Where an employee is injured by falling scales, due to a defective condition of the roof of the mine, the employer is liable if he had notice of such defect, or by reasonable care could have known of it a sufficient length of time to have repaired the roof.<sup>2</sup> But, where the employer has not been negligent in the employment of an underlooker but has used all care to make the mine safe, he would not be liable for an injury from falling scales, even though the underlooker himself had been negligent, for it would be the negligence of a fellow-servant.<sup>3</sup> And if the employee had knowledge of the true condition of the roof, or by the exercise of reasonable care could have known of the danger and continued the work, without objection, he would be held to have assumed the risk of injuries from falling scales, and in case of an injury could not recover.<sup>4</sup>

§ 398. **Same — Injuries from cave-in.** — The rule which requires the master to furnish a safe place to work, does not apply where the work of the servant continuously

<sup>1</sup> *Finalyson v. Utica Min. & Mill. Co.*, 67 Fed. Rep. 507.

<sup>2</sup> *Quincy Coal Co. v. Heed*, 77 Ill. 69; *Fisher v. Lead Co.*, 156 Mo. 479; *Hammon v. Cent. Coal Co.*, 156 Mo. 232.

<sup>3</sup> *Hall v. Johnson*, 84 L. J. Ex., 222, 8 H. & C., 589.

<sup>4</sup> *Watson v. K. & T. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Heath v. Coal Co.*, 65 Iowa, 737; *Olson v. McMuller*, 24 Minn. 94; *Anderson v. Clark*, 29 N. E. 589; *Keegan v. Cavanaugh*, 62 Mo. 232. See, however, *Hammon v. Cent. Coal & Coke Co.*, 156 Mo. 232. "Burns' Rev. St. 1901, §§ 7447, 7466, 7472, 7473, making mine owners liable in damages for failure to provide sufficient props for their mines and to keep such mines safely propped, held not class legislation." *D. H. Davis Coal Co. v. Polland (Ind.)*, 62 N. E. Rep. 492. See Chap., *Personal Injuries in Mines*.

changes the place of work, as excavations by laborers in a mine,<sup>1</sup> for such an extension of the master's liability would make him an insurer and liable for the negligence, or bad judgment, of his employees. Every one is presumed to be familiar with nature's laws and, accordingly, if a mine employee undermines a bank of earth and thereby puts in operation the familiar law of gravitation, he cannot recover for resulting injuries.<sup>2</sup> But if, instead of being due to the work of the servant, the cave-in results from a defective condition of the ground, of which the master had knowledge and the servant was ignorant, he could recover for a resulting injury.<sup>3</sup>

§ 399. **Employee assumes dangers incidental to work.** — It is a familiar rule of law, governing the reciprocal rights and duties arising from the relation of employer and employee, that the employee who contracts for the performance of duties which are particularly hazardous, assumes such risks as proceed from open and obvious causes, which are necessarily incidental to the performance of the duties that he contracted to perform.<sup>4</sup> It is the duty of the employee, in entering into a contract of employment, to exercise reasonable diligence to inform himself in regard to the

<sup>1</sup> *Reiter v. Winona Co.*, 75 N. W. 219; *Allan v. Logan*, 87 Pac. Rep. 496; *Finalyson v. Utica M. & M. Co.*, 67 Fed. Rep. 507; *Bradley v. R. R. Co.*, 138 Mo. 293.

<sup>2</sup> *Rosmussen v. C. R. I. & P. Co.*, 31 N. W. 583; *Olsen v. McMullen*, 24 N. W. 318; *Peterson v. Rushford*, 42 N. W. 1063; *Swanson v. Lafayette*, 33 N. E. 1033; *Vincennes v. White*, 24 N. E. 747; *Griffin v. R. R. Co.*, 24 N. E. 888; *Brown v. Chattanooga & C. Co.*, 47 S. W. 415; *Mickle v. Ry. Co.*, 79 N. W. 22.

<sup>3</sup> *Aldrich v. Furnace Co.*, 78 Mo. 559; *Bradley v. C. & M. Ry.* 138 Mo. 293. As to effect of employer's direction, see *Larson v. Min. Co.*, 71 Mo. App. 512.

<sup>4</sup> *Manly v. Lower Vein Coal Co.*, 55 Iowa, 671; *Williams v. Delaware L. & W. Co.*, 116 N. Y. 628; *Doyle v. St. Paul M. & M. Co.*, 42 Minn. 79.

hazards to which he may be exposed, in the performance of his duties under his contract of employment, and where the dangers incidental to his employment can be easily ascertained, he is under the same obligations as the employer to discover the nature and extent of the risks peculiar to the business in which he is about to engage.<sup>1</sup> But the employee does not agree by his contract of employment to take any extraordinary risks that may arise from the negligence of his master,<sup>2</sup> nor is he responsible for a want of knowledge as to latent defects in the machinery which he is to operate unless his attention has been called to the same,<sup>3</sup> and the rule that he assumes all the dangers that are apparent to him at the time of entering into the contract of employment does not apply where there is a question if the dangers are really incident to the business, or where the existence of the danger is only apparent to those possessing peculiar skill and knowledge in such matters.<sup>4</sup>

<sup>1</sup> *S. W. Virginia's Imp. Co. v. Andrews*, 13 Va. L. J. 634; *Lathrop v. Fitchburg Co.*, 750 Mass. 423; *Watson v. Coal Co.*, 52 Mo. App. 366; *Adams v. Coal Co.*, 85 Mo. App. 486.

<sup>2</sup> *Trihay v. Brooklyn Mining Co.*, 15 Mor. Min. Rep. 535; *Jones v. Florence Min. Co.*, 28 N. W. 207; *Harris Dam. by Cor.*, p. 1134.

<sup>3</sup> *Burton v. Mo. Pac. Co.*, 32 Mo. App. 455; *Davidson v. Cornell*, 81 N. Y. S. R. 982; *Myhon v. Louisiana Lt. & Pow. Co.*, 41 La. An. 964.

<sup>4</sup> *Eddy v. Aurora Iron Min. Co.*, 46 N. W. Rep. 17; *Trihay v. Brooklyn Lead Mining Co.*, 4 Utah, 468; 11 Pac. Rep. 612, cited *supra*; *Davis v. St. L., I. M. & S. Ry. Co.*, 7 L. R. A. 283; *Gains v. C., R. I. & P. Co.*, 37 Mo. App. 676. The ordinary risk assumed by the employee has been aptly defined as being "such as arising out of the nature of the work would happen, notwithstanding the exercise of due care and also the risks arising from the acts of the employee's fellow-servants." *Kielly v. Belcher Silver Min. Co.*, 3 Sawyer, 437; 10 Mor. Min. Rep. 32. If from the nature of work, the employee knows more of the work and its resulting risks than the employer, he cannot recover for a resulting injury. *Westville Coal Co. v. Mielka*, 75 Ill. App. 638; *Coal Valley Min. Co. v. Nelson*, 87 Ill. App. 180; *Watson v. Coal Co.*, 52 Mo. App. 366; 20 Am. & Eng. Enc. Law (2 Ed.), 131.

§ 400. *Same* — Owner should disclose incidental risks. — The question, however, may frequently arise, of how far an employee's assumption of incidental risks will be implied from his contract of employment, and just what knowledge is sufficient to shift the responsibility from the employer. In this connection a distinction is recognized between the employee's knowledge of his actual danger necessarily incidental to his employment and his simple knowledge of the facts, from which this danger may result, without a knowledge of the latter.<sup>1</sup> If the peril is in itself a matter of which he should be informed and the employer fails to inform him, as when it is a result of certain scientific facts not known to ordinary men, then there is no implied knowledge of such danger and the employer would be liable for the injury.<sup>2</sup> In such a case a knowledge of the facts would not raise the legal presumption of a knowledge of the dangers implied therefrom.<sup>3</sup> But if the employee has knowledge of the facts surrounding his employment, and the dangers are but the natural resulting destructive forces from such state of facts and the condition they disclose, then the law would presume his knowledge of his peril, and for an injury he had sustained from a risk thus assumed, he could not recover.<sup>4</sup> The safest rule to follow, however, is for the employer to inform the employee of all risks of which he is informed and the latter is ignorant, for in failing to

<sup>1</sup> *McGowan v. LaPlata Min. & Smelting Co.*, 8 McCreary (U. S.), 393; 10 Mor. Min. Rep. 59; *Smith v. Coal Co.*, 75 Mo. App. 177; *Thompson v. C., R. I. & P. Co.*, 86 Mo. App. 144.

<sup>2</sup> *Coombs v. New Bedford Co.*, 102 Mass. 573; *Hester v. Delt Co.*, 84 Mo. App. 451; *Hysel v. Swift*, 78 Mo. App. 39; *Kelly v. Howell*, 41 Ohio St. 438.

<sup>3</sup> *Ante, idem.* So held in case of a crack in a shaft. *Strahlendorf v. Rosenthal*, 80 Wis. 675.

<sup>4</sup> *McGowan v. LaPlata Min. Co.*, 8 McC. 398. But see, *contra*, *O'Connor v. Adams*, 120 Mass. 427; *Sowden v. Idaho Min. Co.*, 55 Cal. 443.



do so he may be held responsible.<sup>1</sup> In doing so he may save his employee a severe injury.

§ 401. **Exceptional dangers.** — The owner is also considered guilty of willful negligence, for which he would be held responsible in case an injury should result to the employee, when he insists upon the latter entering exceptionally dangerous places, or assuming risks which are not necessarily incident to the duties of the service, which he has contracted to discharge.<sup>2</sup> For while the employee has a right to decline the employment on account of the dangers incident to the service, and although he voluntarily subjected himself to the risks accompanying the business when he entered the employment,<sup>3</sup> it is none the less unreasonable to compel him to subject himself to other dangers, which he had no reason to expect and which are not within the employment for which he had contracted, simply because he prefers to assume the exceptional dangers, rather than incur the displeasure of his employer, and run the lesser risk of losing his employment.<sup>4</sup> It is not every injury, however, that is received beyond the general scope of the employee's duties, for which the owner can be held respon-

<sup>1</sup> *Baxter v. Roberts*, 44 Cal. 187; *Smith v. Oxford Iron Co.*, 2 Mor. Min. Rep. 208; *Parkhurst v. Johnson*, 50 Mich. 70. Mere knowledge that mine is not timbered will not defeat recovery. *Kelly v. Wilson*, 21 Ill. App. 141. For a case — an injury in a lime kiln — where employer was held liable for not instructing an inexperienced employee how to undermine the base of a bank, see *Parkhurst v. Johnson*, 50 Mich 70; 45 Amer. Rep. 28.

<sup>2</sup> *McGowen v. LaPlata Min. & Smelting Co.*, 3 McCrary, 393; *Elbridge v. Atlas Co.*, 55 Hun, 809; 28 N. Y. S. R. 501.

<sup>3</sup> *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468. The employee, however, does not assume questionable risks, apparent only to experts in the business. *Eddy v. Aurora Iron Min. Co.*, 46 N. W. Rep. 17.

<sup>4</sup> *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468; 11 Pac. Rep. 612. But see *Sweeney v. Berlin Co.*, 101 N. Y. 500; *Williams v. Churchill*, 187 Mass. 248.

sible, for contributory negligence in the employee will always decrease the owner's responsibility, and contributory negligence is very often shown by proof of the employee's waiver of his right to refuse to obey the command of the owner.<sup>1</sup> But the employee is frequently influenced by his employer to believe that he has not sufficient grounds to refuse to obey his commands, and as it would be unjust in such cases to hold the employee alone responsible for an injury received in obeying the command, the owner is generally held responsible for an injury sustained by an employee in following up the owner's instructions to do an act which is not within the general scope of his duties, incident to the employment.<sup>2</sup>

§ 402. Acts resulting in death. — "Lord Campbell's Act" has been substantially re-enacted in nearly all of the United States.<sup>3</sup> Under these different statutes only actual and not exemplary damages can be recovered,<sup>4</sup> and, unless there is a special statutory regulation on the subject, the physical and mental suffering of the deceased, and the sorrow, loss of society and grief of the parties entitled to the benefit of the statute, cannot be considered by the court or jury in estimating the amount of damages; and an instruction predicated on such a proposition would be erroneous.<sup>5</sup> The right to maintain the action

<sup>1</sup> *McDonald v. Rock Hill Iron & Coal Min. Co.*, 135 Pa. St. 1; 47 Phil. Legal Int. 334; 19 Atl. Rep. 797.

<sup>2</sup> *Heavey v. Hudson River Water &c. Co.*, 32 N. Y. S. R. 565.

<sup>3</sup> Statutes different States; Stat. 9 & 10 Vict., Ch. 93, Secs. 1 and 2.

<sup>4</sup> *Cooley on Torts*, pp. 318 and 319; *Myers v. San Francisco*, 42 Cal. 215. In the absence of any actual damage the minimum statutory damages are recoverable. For construction of Missouri statute giving damages for death in a mine, see *Hammon v. Coal Co.*, 156 Mo. 232; *Adams v. Min. Co.*, 35 Mo. App. 485.

<sup>5</sup> The basis of the calculation should be something capable of pecuniary measurement. *Rockford Co. v. Delaney*, 32 Ill. 198; *St. Louis*

is conferred generally by these statutes upon the wife, next of kin or personal representatives of deceased, and damages are recoverable, in all cases for their benefit, whenever the injured party himself could have recovered damages if he had survived the effects of the injuries.<sup>1</sup> But whether the injuries result in the death of the injured party or not, if the deceased could not have recovered damages if he had lived, his personal representative after his death would not be entitled to recover,<sup>2</sup> and any negligence on the part of the deceased can be set up as a defense to such an action on the part of the party charged with causing the injury.<sup>3</sup> Nor could the personal representative maintain the action, after the death of the injured party, if the deceased had himself obtained satisfaction for the injury prior to his death,<sup>4</sup> for whether the

&c. Co. v. Freeman, 36 Ark. 41. But see *Frick v. St. Louis &c. Co.*, 75 Mo. 542.

<sup>1</sup> *Stewart v. Louisville &c. Co.*, 4 So. Rep. 373; *Walters v. Chicago &c. Co.*, 36 Iowa, 458; *Atlantic &c. Co. v. Venable*, 65 Georgia, 55; *Hartford &c. Co. v. Andrews*, 86 Conn. 212. The English statute gave the action to the wife, husband, parent or child; not to deceased's estate, and his creditors had no recourse to reach this fund. Cooley on Torts, and citations, p. 316.

<sup>2</sup> Stat. 9 and 10 Vict., Ch. 93, Secs. 1 and 2; Statutes different States; *Holan v. Daly*, 106 Ill. 131; *Ind. &c. Co. v. Stout*, 53 Ind. 143; *Meede v. Holbrook*, 20 Ohio, 137.

<sup>3</sup> *Bartonshill Coal Co. v. Reed*, 3 Macq. H. L. Cas. 266; *Senior v. Ward*, 1 El. & El. 385, — generally followed in U. S. — *Cordell v. N. Y. &c. Co.*, 75 N. Y. 330; *Corcoran v. Boston &c. Co.*, 133 Mass. 507; *Ind. &c. Co. v. Greene*, 106 Ind. 279. In some States the negligence of a fellow-servant will prevent a recovery. *McDonald v. Eagle &c. Co.*, 68 Georgia, 839; *Philo v. Ill. &c. Co.*, 33 Iowa, 47. But in some States contributory negligence is no defense. *Nashville &c. v. Smith*, 6 Helsk. 174; *Merrill v. Easton &c. Co.*, 139 Mass. 252. And see *Besenecker v. Sale*, 8 Mo. App. 211.

<sup>4</sup> *Read v. Great Eastern Co. (L. R.)*, 3 Q. B. 555; *Senior v. Ward*, *supra*; *Conner's Ad. v. Paul*, 12 Bush, 144; *Holton v. Daly*, 106 Ill. 131; *Boone on Cor.* 85; *Cooley on Torts*, section 264, p. 309. But in any case,

satisfaction was obtained by legal proceedings or voluntary settlement, or compromise, the wrongful act and all its consequences would be canceled and the liability of the wrong-doer forever ended.

§ 403. **Contributory negligence in employee.** — It is a well-settled rule of law that an employee cannot hold his employer responsible for damages incurred, resulting from the peculiar service in which he has engaged, where he had full knowledge of the circumstances on entering the service,<sup>1</sup> unless the owner has been guilty of some negligent act which really occasioned the injury.<sup>2</sup> The employee voluntarily takes upon himself the risk and hazard of the business, and if he receives an injury through his own culpableness or negligence, he alone must bear the injury.<sup>3</sup> If an existing peril, not necessarily incident to his employment, comes to the knowledge of the mine employee,

after a compromise by the injured party, before an action will lie, there must have been a return, or tender of the consideration paid. *Billings v. Aspen &c. Co.*, 52 Fed Rep. 250; *Ock v. M., K. & T. Ry. Co.*, 180 Mo. 27; *Carson v. Smith*, 133 Mo. 606, at p. 614.

<sup>1</sup> He must exercise ordinary care to avoid risks, and if he fails to do so, cannot recover for injury. *Griffith v. Gidlow*, 10 Mor. Min. Rep. 639; *Canter v. Colorado Min. Co.*, 15 Mor. Min. Rep. 559.

<sup>2</sup> Such would be the selection of unsafe instrumentalities. *Berea Co. v. Kraft*, 10 Mor. Min. Rep. 16; *Ardesco Oil Co. v. Gilson*, 10 Mor. Min. Rep. 669.

<sup>3</sup> *Lehigh Valley Co. v. Jones*, 10 Mor. Min. Rep. 80; *Senior v. Ward*, 10 *Id.* 646. Where there are different modes of performing the same duty, and the servant selects the more dangerous, he alone is responsible for his acts if an injury results from his selection, and as he contributes to the injury, in failing to exercise ordinary care in selecting the least dangerous method of performing the duty, the employer is not, in such case, responsible for such an injury. *Lake Sup. Co. v. Erickson*, 10 Mor. Min. Rep. 39. The use of one's hand, instead of a stick, to cast machinery, will bar a recovery. *Wetjen v. White Lead Co.*, 5 Mo. App. 597. Taking advice of others is not contributory negligence. *Lake Superior Co. v. Erickson*, *supra*.

it is his duty to bring the same immediately to the knowledge of the mine owner or operator,<sup>1</sup> and the mine owner could not be held responsible for an injury which resulted to the employee before he had any knowledge of the existing peril, for the failure of the employee to bring the knowledge home to the mine owner would very properly be held to constitute contributory negligence on his part.<sup>2</sup> So in all cases where a mine employee tries to recover damages from his employer for an injury received by reason of the latter's negligence, the burden of proof is upon the employee to show the specific acts which constitute the negligence of the mine owner, both on account of the employee holding the affirmative of the proposition and also because he would have to refute the legal presumption of a proper performance of duty by the mine owner.<sup>3</sup> But in order to bar a recovery by an employee for an injury received in the regular course of his employment, the conduct of such employee must really have been negligent, and his negligence must have contributed to the injury in such a way that if he had not been negligent he would not have received the injury in discharging his duties.<sup>4</sup> And in determining whether or not an employee has been guilty of negligence in a given case, regard must be had to the danger to be apprehended, the reasonable probability of incurring it, as well as the natural presumption that he would, in such case, exercise ordinary care and diligence.<sup>5</sup>

<sup>1</sup> *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Baxter v. Roberts*, 44 Cal. 187.

<sup>2</sup> *Cooley on Torts*, § 564, and cases cited. *McGowan v. LaPlata Co.*, 10 M. M. R. 59; *Parkhurst v. Johnson*, 50 Mich. 90.

<sup>3</sup> *Heath v. Whitebreast C. & M. Co.*, 65 Iowa, 747.

<sup>4</sup> *St. Louis Iron & Bolt Co. v. Brennan*, 20 Ill. App. 555; *Silver Cord S. & S. Min. Co. v. McDonald* (Colo.), 23 Pac. Rep. 346.

<sup>5</sup> *Stokes v. Saltenstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Met. (Mass.)

§ 404. **Employer's liability to third persons.** — The doctrine of *respondet superior* applies only to acts of an agent performed in the general scope of his employment.<sup>1</sup> The liability of corporations for the torts of their servants or agents, performed in the scope of their employment, is the same as that of a private person,<sup>2</sup> and if the servant goes outside of his employment and without regard to his service, acting with malice, or in order to effect some purpose of his own, wantonly causes damage to another, the master, in such case, is not responsible for the acts of his servant.<sup>3</sup> But where a third person is injured by the negligent act of a servant, done in the regular course of his employment, the master is liable for such an injury, although he did not authorize or know of the servant's act or neglect, or even if he disapproved of or forbade the same.<sup>4</sup> And the master is liable for the acts of a third party assisting his servant, when the act is done with his consent and for the servant or by reason of his

1; *Cook v. Parkam*, 24 Ala. 21, 34. As to how far rule of contributory negligence will be affected by surrounding circumstances, see *Wesley City Coal Co. v. Healer*, 84 Ill. 126.

<sup>1</sup> *Pinkerton v. Gilbert*, 22 Ill. App. 568; *Farber v. Mo. Pac. Ry. Co.*, 32 Mo. App. 378; *Ardesco Oil Co. v. Gilson*, 10 Mor. Min. Rep. 669.

<sup>2</sup> But the act must have been performed either under express or implied authority. *Satterfield v. W. U. T. Co.*, 28 Ill. App. 446.

<sup>3</sup> *Mars v. Ills. & H. Canal Co.*, 54 Hun, 625; 28 N. Y. S. R. 228. The liability of the master does not relieve the servant from the responsibility for his own neglect and they are usually liable as codefendants and can be so sued. *Wright et al. v. Compton*, 58 Ind. 337; 2 Mor. Min. Rep. 189. If the act is one that is unlawful, negligence is presumed. *Ante, idem.* Servant liable for results of his own negligence, both to employer and to third parties. *Ewing v. Jansen*, 57 Ark. 237; *South Chicago Co. v. Workman*, 64 Ill. App. 383; *Beard v. Horton*, 86 Ala. 202; *Harriman v. Stowe*, 57 Mo. 93.

<sup>4</sup> *Ellegerd v. Auckland*, 43 Minn. 352; 45 N. W. 715; *Cook v. Houston Direct Nav. Co.*, 76 Tex. 358; 13 S. W. 475.

wish or desire;<sup>1</sup> and where the injury results from the negligent use of explosives, or dangerous appliances, as the greatest degree of care and diligence is requisite in the handling of such agencies, the master would be liable for such an injury, and the legal duty of using them in a careful and skilled manner, could not be shifted from the master to his servants, so as to exonerate the master from the negligent act of his servant.<sup>2</sup>

§ 405. *Termination of service.*—The usual grounds given in the text-books on the subject, for the discharge of an employee, are disobedience to the orders of the employer; conduct grossly immoral, and such negligence in the discharge of the duties of the employee as would prejudice the business of the employer.<sup>3</sup> It has been held in the earlier cases that in order to justify the employer to terminate the service, before the expiration of the period stipulated for in the contract of hiring, the employee must be guilty of acts which come within one of these three subdivisions,<sup>4</sup> but this view has been controverted in some of the later decisions, and the better doctrine now obtains, which allows the employer to discharge the employee for any acts of misconduct, whether the

<sup>1</sup> *James v. Muehlebach*, 34 Mo. App. 512. But see *Mangan v. Foley*, 33 Mo. App. 250.

<sup>2</sup> *Pittsburg & Co. v. Shields*, 47 Ohio St. 387. A company or individual owner is responsible for an injury resulting from a failure to keep a mine and works properly protected. *Lake Sup. Co. v. Erickson*, 10 Mor. Min. Rep. 39. But only reasonable efforts are required to prevent an explosion from fire damp or gas. *Berns v. Coal Co.*, 27 W. Va. 285.

<sup>3</sup> *Gonsolls v. Gearhart*, 31 Mo. 585; *Beggs v. Fowler*, 32 Mo. 599; *Boss Furn. Co. v. Glasscock*, 32 Ala. 452; *McCormick v. Demary*, 10 Neb. 515.

<sup>4</sup> *Speck v. Philllips*, 5 M. & W. 279; *Filleul v. Armstrong*, 4 Ad. & El. 557.

employee is guilty of moral turpidity or not.<sup>1</sup> The contract of hiring, whether for a definite, or an indefinite period, is not held to deprive the employer of his authority to terminate the service, if sufficient cause exist for him to discharge the employee, and when the service is terminated upon sufficient cause, the discharge of the employee has been held to operate as a forfeiture of his right to recover his future wages.<sup>2</sup> But this opinion is not borne out by the weight of authority and the better view undoubtedly is that the employee could recover on a *quantum meruit* for the value of his services, even though he had been guilty of such improper conduct as to justify his employer to rescind the contract and terminate the service.<sup>3</sup> But it has been also held, with much fairness, that if an employee, for a definite period, is improperly discharged before the termination of his service, he can recover as for the full contractual period.<sup>4</sup> However, all such actions would necessarily be on a general count for work and labor done and not a special contract,<sup>5</sup> except where the full remuneration was asked, for the action of debt would only lie where the certainty of the sum demanded appeared.<sup>6</sup>

<sup>1</sup> *Gonsolis v. Gearhart*, *supra*; 14 Am. & Eng. Enc. Law, p. 788 *et sub*.

<sup>2</sup> *Cases supra*; *Elsee v. Gotward*, 5 J. R. 148; *Sylses v. Dixon*, 9 A. & E. 963.

<sup>3</sup> *Kirk v. Hartman*, 68 Pa. St. 97; 11 Mor. Min. Rep. 450. But that servant had been in other employment or refused similar work could be shown in mitigation of damages and prevent a recovery as for the whole contract period. *Saxonia Min. Co. v. Cook*, 7 Colo. 569.

<sup>4</sup> *King v. Steiren*, 8 Wright, 99; *Kirk v. Hartman*, 11 Mor. Min. Rep. 450.

<sup>5</sup> *Kirk v. Hartman*, 68 Pa. St. 97.

<sup>6</sup> *Buller's Nisi Prius*, 167. If the contract is entire and the servant quits the employment, then he cannot recover. *Isaacs v. McAndrews*, 9 Mor. Min. Rep. 690.



## CHAPTER XXV.

### TAXATION OF MINING PROPERTY.

- SECTION 406. Taxation in general.**  
407. Limitations upon legislative power.  
408. Right to tax mining property.  
409. Basis of taxation of mining property.  
410. Same — Surface and ore deposits.  
411. Relative duties of lessor and lessee.  
412. Mines on public land exempt in most States.  
413. Limits of exemption.  
414. Exemption does not extend to mines on private land.  
415. Taxation of mining corporations.  
416. Same — Taxation of corporate business.  
417. Priority of tax lien.  
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§ 406. **Taxation in general.** — Generally speaking, a tax is a charge, or assessment, in the nature of a forced contribution, levied by the government for its own support, upon the persons and property of the people within the State or district.<sup>1</sup> There is no limitation upon the power of the government in selecting the subjects of taxation, and almost all species of property may be subjected to taxation.<sup>2</sup> The State may select, without limitation, the occupations and character of property upon which a tax may be imposed, and in the exercise of its discretion the legislature of a State may exempt certain property from taxation.<sup>3</sup> A tax may be levied upon any property lying within the boundaries of a State, whether it

<sup>1</sup> Tiedeman's Pol. Pow., Sec. 1; Cooley on Taxation, Sec. 12.

<sup>2</sup> Is a matter for legislative department. *Stanley v. Little Pittsburg Co.*, 14 Mo. Min. Rep. 214.

<sup>3</sup> *State v. North*, 21 Mo. 464; *People v. Coleman*, 8 Cal. 46. In some States there is a constitutional inhibition against such exemptions. See *Constitution Missouri*.

belongs to a citizen or an alien, for the proceedings for the enforcement of the levy are in the nature of actions *in rem*, against the property, and not *in personam* against the proprietor.<sup>1</sup> The obligation to pay taxes is one of the duties of the citizen, and except as regards real property the duty rests, generally, upon the fact of domicile and citizenship. A tax upon personalty must be assessed at the place of the owner's residence, and a personal tax cannot be assessed against a non-resident, nor can his property be taxed when its *situs* is beyond the boundaries of the State.<sup>2</sup>

§ 407. Limitations upon legislative power. — It has been claimed by eminent authority, that there is hardly any limitation upon the power of the legislature to determine the rate and objects of taxation, and it is true that the only limitation upon the power of the legislature to select the different subjects of taxation is that imposed by the United States Constitution and the constitutions of the different States.<sup>3</sup> The power of taxation is essential to the existence of every government, and as the power comes originally from the people,<sup>4</sup> they give to the government the right to tax both themselves and their property. But it is provided by the constitutions of the different States that the taxation must be of

<sup>1</sup> Cooley on Taxation, 360; *idem*, 278-279.

<sup>2</sup> *Commonwealth v. Cameron* (Mo. App.), 2 West. 144. "Stock of a mining company is to be taxed as of the place where its works are situated or the greater part of its operations conducted. Where it was disputed as to which county had the right to tax, and the company has sought to enjoin its collection against one of those counties, the bill must allege affirmatively that the company is liable to taxation in the other county." *Garrett County v. Franklin Coal Company*, 45 Md. 473; M. M. D. 369.

<sup>3</sup> Tiedeman's Lim. of Pol. Pow., p. 472.

<sup>4</sup> *Ante, idem*.

a uniform apportionment,<sup>1</sup> and while the same rule of uniformity is not employed in the apportionment of all taxes, the requirements of the different State constitutions are essentially the same, as regards the equality and uniformity of the basis of taxation.<sup>2</sup> The rule of apportionment must be the same for all persons and for all the different sections of the taxing district,<sup>3</sup> and the apportionment is generally made according to the value of the property taxed, for the reason this will bring about a more perfect equalization of the tax than any other rule.<sup>4</sup> The United States government is authorized by the Constitution to impose direct taxes, but the provision that requires that the tax shall be uniform throughout the government necessarily compels that the apportionment should be made according to the representative population of the different States.<sup>5</sup> The different States have the right under the exaction of license fees to tax the different occupations within the State,<sup>6</sup> but this authority is construed strictly by the courts; the particular calling must be named,<sup>7</sup> and if it is not dangerous to the public, it cannot be subjected to any police regulation, which does not fall within the power of taxation.<sup>8</sup>

<sup>1</sup> See Con. U. S., Art. I., Sec. 8. "A statute which directs a tax upon the proceeds of mines upon an assessment of three-fourths of their value, is unconstitutional, under the provision for equal taxation." And when the proceeds of mines are liable to tax, instead of the real estate, the whole of such proceeds, and not a fraction, must be the basis of such tax. *State v. Estabrook*, 3 Nev. 173.

<sup>2</sup> See Constitutions different States.

<sup>3</sup> Tiedeman's Pol. Pow., p. 479.

<sup>4</sup> Tiedeman's Pol. Pow., p. 478.

<sup>5</sup> Tiedeman's Lim. Pol. Pow., *supra*.

<sup>6</sup> *Commonwealth v. Ocean Oil Co.*, 14 M. M. R. 126.

<sup>7</sup> *State v. Eureka Co.*, 14 M. M. R. 165.

<sup>8</sup> Tiedeman's Pol. Pow., p. 273, *et sub.* "A mining company assaying its own ores, is required to pay a special tax as assayer under Div. 48, Sec. 79, Internal Revenue act of June 30, 1864, as amended in 1866." *Yellow Jacket S. M. Co. v. Gize*, 1 Sawyer, C. C. 494; M. M. D. 369.

§ 408. **Right to tax mining property.** — The different States have the right to levy a tax upon mining property, the same as any other property located within the State,<sup>1</sup> and the right extends not only to the property owned by the individual citizen of the State, but also to the possessory right of the claimant and the mineral located upon public lands.<sup>2</sup> The legislatures of the different States, however, do not possess the authority to levy a tax upon the claimant of public mineral land, assessed according to the value of the land upon which the claim is located,<sup>3</sup> for as the title to such land is possessed by the general government alone, this is the only power that would have the authority to levy such a tax, and the right of the

<sup>1</sup> *Hersey v. Barron Co.*, 37 Wis. 79; *Mil. Iron Co. v. Hubbard*, 29 *Id.* 51. And the mineral itself, since it can by conveyance become separate property, may be taxed as other real estate. *Stuart v. Commonwealth* (Ky.), 23 S. W. Rep. 367; *Palmer v. Conwith*, 3 Chand. (Wis.), 297; *Logan v. Washington County*, 29 Pa. St. 373; *City of Virginia v. Challor & Co. G. & S. M. Co.*, 2 Nev. 86. But an attempt to impose a tax on mineral exported from the State is void, as an attempt to regulate commerce between the States. *Jackson M. Co. v. Auditor-Gen.*, 32 Mich. 488; *Brumagin v. Tillingast*, 18 Cal. 266.

<sup>2</sup> *State v. Moore*, 12 Cal. 56; *aff'd People v. Shearer*, 30 Cal. 645; *Hale & Co. G. & S. M. Co., v. Storey Co.*, 1 Nev. 105.

<sup>3</sup> *State v. Moore*, 12 Cal. 66; *Forbes v. Gracey*, 94 U. S. 762. "The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property." *State v. Moore*, 12 Cal. 56; *M. M. D.* 366. "Possessory rights to mining claims are property, and as such are taxable. Taxation of such possessory rights is not in violation of the organic act of Nevada territory, which prohibits taxation of the property of the United States. The object of such provision in the organic act was to protect the government, and not to prevent the taxation of such interests as settlers might acquire upon the public lands. The words, 'mining ground,' when used in a deed, have a technical meaning. They refer to the interest of the occupant. They are not the words used when a fee-simple or leasehold interest in real estate is to be conveyed; and, when used by the assessor, are a proper description of the taxable interest." *Hale and Norcross G. & S. M. Co. v. Storey County*, 1 Nev. 105; *M. M. D.* 366.

State is limited to the value of the locator's claim, as the possessory right of the miner is the only property under the jurisdiction of the State to tax.<sup>1</sup> The State cannot tax an interest in mining property which in reality is nothing but a mere *chose in action*,<sup>2</sup> but until the mineral taken from mines within the State has been removed beyond the boundaries of the State, the same may be taxed as property in that State,<sup>3</sup> and the tax could be collected, even though the mineral be subsequently removed beyond the boundaries of the State, when the property was removed before the amount of the tax was determined, or the manner of enforcing the levy decided upon.<sup>4</sup>

§ 409. **Basis of taxation of mining property.** — Not only the land itself, upon which a mine is located, but all manner of mines and quarries, as well as the mills, furnaces, plants and works are subject to taxation, as a part and parcel of the land itself.<sup>5</sup> And while it would seem that there could be no separate assessment upon the value of a mine before the same was opened, as no mine, in fact, existed previously, still, under the English Income statute,<sup>6</sup> the act was held to apply to a mine not opened when the law was passed, as it was held to be but land and the potential profit therefrom, which was in existence when the law was enacted.<sup>7</sup> Under the English

<sup>1</sup> *Ante, idem.* *People v. Black Dia. C. M. Co.*, 37 Cal. 54.

<sup>2</sup> *Jackson Co. v. Auditor Gen.*, 14 M. M. R. 182.

<sup>3</sup> Silver bullion is such property. *Hope Min. Co. v. Kennon*, 14 M. M. R. 189; *State v. Northern Belle Co.*, 14 M. M. R. 211; *State v. Eureka Co.*, 14 M. M. R. 165.

<sup>4</sup> *People v. Horn Silver Co.*, 105 N. Y. 76.

<sup>5</sup> *MacSwinney Mines*, p. 551; *Barringer & Adams*, p. 113.

<sup>6</sup> 5 & 6 Vict., C. 35, Sch. A.

<sup>7</sup> *Colchester v. Kenney, L. R.*, 2 Exch. 257; *R. R. v. Randall*, 4 E. & B. 564. By statute, in Utah, the tax is upon the net annual proceeds of

law the income from a mine is assessable according to its annual value, based upon the profits of the preceding year, subject to abatement or discharge on the diminution or failure of the mine,<sup>1</sup> but no allowance is made for capital exhausted in realizing the profit or expense incurred in opening the mine,<sup>2</sup> the annual benefit or "profit received" being used as the measure of taxation to which the property is subject.<sup>3</sup> The recent law by Congress under which incomes were made taxable in the United States was held to be unconstitutional by the Supreme Court.<sup>4</sup>

§ 410. *Same — Surface and ore deposits.* — The duty of paying taxes, being primarily upon the owner of the land, so long as the ownership of the ore is the same as that of the surface, the surface owner should pay taxes upon the ore in place, as a part and parcel of his land.<sup>5</sup> But when there is a severance of the titles and the ownership of the ore passes to other than the surface owner, he should bear the burden of his own property, the same as the surface owner should, and the surface and the mineral in place should be accordingly assessed to the

mines. *Cen. Eureka Min. Co. v. Juan Co.*, 22 Utah, 395; 62 Pac. Rep. 1024.

<sup>1</sup> *MacSwiney on Mines*, 552. Quarries are not taxable as "mines." *Jones v. Crowthen Co.*, 4 Ex. Ch. D. 97.

<sup>2</sup> *Knowles v. McAdam*, 8 Exch. D. 23; *Coltness Co. v. Block*, 6 App. Cas. 315; *Ryhope Co. v. Thayer*, 7 Q. B. D. 485.

<sup>3</sup> *Coltness v. Block*, *supra*.

<sup>4</sup> See *Income Tax Cases*. In the United States, the income of a mine is no criterion for an assessor in making a valuation. *State v. Randolph Twp.*, 14 Mor. Min. Rep. 103; *State ex rel. v. Dickinson*, 25 N. J. L. 427; 14 M. M. R. 108; *California v. Moore*, 12 Cal. 56; 14 M. M. R. 110.

<sup>5</sup> *Heckshear v. Sheaffer*, 17 W. N. C. 323; *Logan v. Washington County*, 39 Penn. St. 373; *Virginia v. Potosi Co.*, 14 Mor. Min. Rep. 120; *State v. Moore*, 14 M. M. R. 110.

respective owners.<sup>1</sup> But after the title to the ore is severed from that to the surface, no higher valuation should be put upon the interests separately than existed when the same person owned both surface and ore,<sup>2</sup> and before a severance of the title to the ore from that of the surface the ore and land must both be assessed together and the surface and the ore cannot be separately valued, as where the titles to the same are distinct.<sup>3</sup>

§ 411. **Relative duties of lessor and lessee.** — Generally speaking, in the absence of contract, the lessor is under the duty to pay the taxes upon ore in place,<sup>4</sup> and the lessee to pay for all improvements annexed by him,<sup>5</sup> as well as upon all ore severed from the soil,<sup>6</sup> for both would be per-

<sup>1</sup> *Sanderson v. Scranton*, 105 Pa. St. 469; *Logan v. Washington County*, 14 Mor. Min. Rep. 108. "Minerals removed from the land and converted into personal property may be taxed as such." *Palmer v. Conwith*, 8 Chand. (Wis.) 297; M. M. D. 366, 368. Oil in place is a part of the real estate and cannot be taxed as personalty against a lessee, until it reaches the surface. *Carter v. Tyler Co. Ct.*, 45 W. Va. 806; 43 L. R. A. 735; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 39 L. R. A. 765.

<sup>2</sup> *Logan v. Washington County*, 14 M. M. R. 108; 29 Pa. St. 373; *Sanderson v. Scranton*, 105 Pa. St. 469; *Forbes v. Gracey*, 14 M. M. R. 183; *People v. Black Diamond Co.*, 14 *Idem*, 162; *Hale v. Storey County*, 14 *Id.* 115.

<sup>3</sup> *Scranton v. Gilbert*, 16 W. N. C. 28. "Under 1 Ballinger's Ann. Codes & St., § 1698, providing that realty on which is a mine shall be valued at such price as such property, including the mine, will sell for at a fair voluntary sale for cash, where improvements on mining claims include tunnels and buildings, or operating the mines, the realty and improvements may be valued for taxation as a whole." (Wash. 1902.) *Eureka Dist. Gold Min. Co. v. Ferry County*, 68 Pac. Rep. 727. The surface and minerals are separately taxable. *Sanderson v. Scranton*, 105 Pa. St. 469; *Delaware Co. v. Sanderson*, 109 Pa. St. 583.

<sup>4</sup> *Flory v. Heller*, 1 Monaghan, 478; *Welsh v. Reinhard*, 14 Mor. Min. Rep. 175.

<sup>5</sup> *Heckshear v. Sheaffer*, 17 W. N. C. 323; *Stanley v. Pittsburg Co.*, 14 M. M. R. 214.

<sup>6</sup> *Woodward v. D. L. & W. R. Co.*, 121 Pa. St. 344. Where lease has

sonal property for which he would be as much liable to taxation as though neither were, or had been, connected with the land of the lessor. But the duty to pay the taxes may be the subject of special covenant between the lessor and lessee, and such covenants will be enforced by the courts. Where the lessee covenants to pay the taxes on "all improvements," the increased taxes on the land, by reason of the annexations, are held within the covenant.<sup>1</sup> A covenant that the lessor should pay "all taxes," will subject him only to the payment of assessments upon the surface and the ore in place;<sup>2</sup> but where his covenant binds him to pay upon the surface and the ore in place he will not be relieved therefrom, although the language of the lease transferred the absolute title to the lessee of the ore in place.<sup>3</sup>

§ 412. **Mines on public land exempt in some States.** — The legislatures of the different States have the right, not only to determine upon what occupations and what property a tax may be imposed, but they also have the right, in the exercise of their discretion, either with or without laudable reasons, to exempt from the levy any occupation or any kind of property.<sup>4</sup> There are provisions in the constitutions of some of the mining States exempting mines from taxation that are located upon the public domain,<sup>5</sup>

effect of vesting title to mineral in lessee, it is error to assess same to owner of surface. *Jones v. Wood*, 2 Ohio Dec. 75.

<sup>1</sup> *Heckhear v. Sheaffer*, 17 W. N. C. 328.

<sup>2</sup> *Miles v. D. & H. Canal Co.*, 140 Pa. St. 623.

<sup>3</sup> *Woodward v. D. L. & W. R. Co.*, 121 Pa. St. 344.

<sup>4</sup> Constitution and Statutes different States; *State v. Gracey*, 11 Nev. 235; 4 *Id.* 198-332; *State v. Eureka Con. M. Co.*, 8 Nev. 14, under act Feb. 28, 1871, exempting mines, etc.; *Wade Min. Laws*, p. 247.

<sup>5</sup> *State v. Nor. Belle Co.*, 14 M. M. B. 211, where exemption of Nevada constitution is construed.



and as the object of the exemption is for the benefit of the general government, rather than the interest of the individual citizen, such provisions are not held in violation of the acts by which the different States were admitted into the Union.<sup>1</sup> All exemptions from taxation, however, are construed strictly by the courts, for the reason that they are contrary to the ordinary rules of taxation;<sup>2</sup> but where mining property has been exempt from taxation the exemption cannot be avoided by a levy upon the same property under any other statute;<sup>3</sup> and where mining property and claims on public land are exempt by State constitution for a certain length of time, on the expiration of that period new legislation would be necessary in order to again subject that property to taxation.<sup>4</sup> And a provision that at the expiration of such period the property "*may*" again be taxed does not necessarily mean that it *shall* be subject to taxation, and would not dispense with the necessity for legislation authorizing such a tax.<sup>5</sup>

§ 413. *Same — Limits of exemption.* — The exemption in the constitutions of the Western States of mining claims upon the public land, does not extend to the proceeds from such mines, but when ore is dug and detached from the land upon a public land claim it becomes personal property and, as such, is subject to State taxation the same as other species of personalty.<sup>6</sup> Nor do such exemptions extend to improvements made by the owner of a claim upon the land,

<sup>1</sup> *People v. Black Diamond C. M. Co.*, 37 Cal. 54.

<sup>2</sup> *Commonwealth's App.* 127 Pa. St. 435.

<sup>3</sup> *Wade Amer. Min. Laws*, § 157 and cases cited.

<sup>4</sup> *Re House Resolution*, 21 Pac. Rep. 471.

<sup>5</sup> *P. & H.*, 12 Colo. 369.

<sup>6</sup> *Forbes v. Gracey*, 14 M. M. R. 183. Silver bullion liable to taxation. *Hope Min. Co. v. Kennon*, 14 M. M. R. 189; *State v. Northern Belle Co.* (Nev.), 14 M. M. R. 211.

but all wells, furnaces and plants are as much subject to the burden of taxation as though erected on land not exempt.<sup>1</sup> Nor is it held to be in violation of the organic provision exempting public mining land, for the State legislature to tax the possessory right of the claimant, for this is often a valuable right of property and is essentially the right of an individual as distinguished from the public or the general government;<sup>2</sup> so, though only a possessory title, such mining claims are held to be property and, as such, subject to taxation.<sup>3</sup>

§ 414. **Exemption does not extend to mines on private lands.** — The evident reason for the exemption from State and Federal taxation of mines upon the public domain is the same as that which exempts the public land from taxation, for until severed from the land the mineral is a portion of it and for the government to tax its own lands would be indeed an inconsistency. This rule, however, which obtains in the case of mines upon the public land has no application to mines located on the land of individuals, for there is no reason why mining property should not be subject to taxation the same as any other property. Indeed, a law exempting such property from taxation would be violative of the organic law of the general government and the constitutions of the different States.<sup>4</sup>

<sup>1</sup> Gold Hill Co. v. Caledonia Co., 14 Mor. Min. Rep. 202; Hope Min. Co. v. Kennon, 14 *Id.* 189.

<sup>2</sup> Hale Co. v. Storey County, 14 M. M. R. 115.

<sup>3</sup> Forbes v. Gracey, 14 *Idem*, 183; People v. Black Diamond Co., 14 M. M. R. 162; State v. Moore, 14 *Idem*, 110; Hale Company v. Storey County, *supra*.

<sup>4</sup> Con. U. S. and of several States. Forbes v. Gracy, 14 Mor. Min. Rep. 183. Mining land owned by a private person is not exempt under Idaho statute, Sec. 1401. Salisbury v. Lane, 63 Pac. Rep. 383.

§ 415. **Taxation of mining corporations.**—The property of mining corporations, both real and personal, is subject to taxation by the State, the same as property belonging to the individual citizen. In many of the States the cost of the property is taken as the basis of the estimate of taxation, but in a greater number of the States the tax is assessed according to the present value of the corporate property.<sup>1</sup> The rules and methods for the taxation of corporations vary in detail in the different States,<sup>2</sup> but, as a general rule, a tax may be levied upon the shares of the different stockholders of a corporation irrespective of any tax assessed against the corporation itself.<sup>3</sup> A franchise tax is generally based upon the amount of capital stock of the corporation, and is in the nature of a license fee charged by the State for the privilege of doing business as a corporation within the State.<sup>4</sup> But where the method of taxation is a tax upon the capital stock, a tax cannot be assessed upon property exempt from taxation, or property otherwise taxed, although it may form a part of the capital stock, for the courts would not enforce a double taxation of any species of property,<sup>5</sup> and where, under the law, the property is not liable for the taxes assessed against it, if the levy would interfere with the business of the corporation, a court of equity would interfere by injunction to restrain the enforcement of the tax.<sup>6</sup>

<sup>1</sup> Beach on Cor., § 800 and note; *State v. Randolph Township*, 14 M. R. 103.

<sup>2</sup> Beach, § 798.

<sup>3</sup> Beach, § 798. Even though corporation is a foreign mining company. *Atty.-Gen. v. Bay State Co.* 14 Mor. Min. Rep. 158.

<sup>4</sup> *Kittany C. Co. v. Com.*, 79 Pa. 100; *Oliver v. Cornwall Co.*, 12 Allan (Mass.), 298; *People v. Aud.-Gen.* 9 Mich. 144.

<sup>5</sup> *Commonwealth v. Pottsville Iron & Steel Co.*, 27 Atl. Rep. 371. But see, *contra*, *Hope Mining Company v. Kennon*, 14 M. M. R. 189.

<sup>6</sup> Beach on Cor., § 830 *et sub.* A tonnage tax on ore has been held

§ 416. Same—Taxation of corporate business.— Under the right of the State to tax corporations according to the amount of business transacted,<sup>1</sup> many of the States have levied a tax upon the net earnings or dividends of mining and smelting corporations, which is generally assessed on the tonnage of the mineral which they are producing.<sup>2</sup> It is not considered an interference with interstate commerce for a State to levy a tax against a foreign corporation, when the tax is limited to receipts for business done entirely within the State;<sup>3</sup> nor is it contrary to the rule of uniformity required by the constitutions of the different States,<sup>4</sup> and while a corporation may claim property exempt

vold. *Jackson Co. v. Auditor-Gen.*, 14 M. M. R. 182. As to basis of assessment, see *Eureka Dist. Gold Min. Co. v. Feary County*, 68 Pac. Rep. 727. "A corporation organized under the general law providing for manufacturing companies for the purpose of manufacturing iron and steel, and which is a manufacturing company and nothing else, is a corporation organized 'exclusively' for manufacturing purposes, and its capital stock is exempt from taxation, though it has the ancillary power, which it has never exercised, to own mineral lands, and mine ore therefrom." *Commonwealth v. Pottsville Iron & Steel Co.* (Penn.), 27 Atl. Rep. 371. "But a corporation whose business is to manufacture coke, but which has and continually exercises the power to mine its own coal to supply itself in part with the raw material for manufacturing coke, is not a corporation organized 'exclusively' for manufacturing purposes, within the meaning of act 1889, exempting such corporations from taxation on their capital stock." *Commonwealth v. Juniata Coke Co.* (Penn.), 27 Atl. Rep. 373. "A mining corporation may be lawfully required to pay a tax upon the market value of its stock in excess of the total value of its real and personal property. *Oliver v. Cornwall Cop. Co.*, 12 Allen (Mass.), 298. "A mining corporation may be compelled to pay a tax on its stock although part of such stock be owned by citizens of other States." *Idem*; M. M. D. 368.

<sup>1</sup> Beach on Cor., § 807.

<sup>2</sup> Mich. Gen. Sta., §§ 1189, 1226, 1229; 5 Political Science Quarterly, 269, 307; *Com. v. Penn. Co.*, 14 M. M. R. 163.

<sup>3</sup> *Com. v. Ocean Oil Co.*, 59 Pa. 61; 62 *Id.* 241; 14 M. M. R. 126. Tax on corporate net income here defined. But see, *contra*, *Jackson Min. Co. v. Auditor-General*, 32 Mich. 488; 14 M. M. R. 182.

<sup>4</sup> *Weber v. Reinhard*, 14 M. M. R. 175. "The return made by a cor-

from taxation, the same as an individual,<sup>1</sup> still, to exempt a corporation from taxation, it is generally required that it must carry on its specific business within the limits of the State where the exemption is provided for.<sup>2</sup> Under the above rule it has been held that a mining corporation that manufactured and refined its products in one State, and sold and delivered the same within another State, could not claim an exemption from taxation under the laws of the latter State, even though its property would not otherwise have been subject to taxation, for the reason that its business was carried on outside the taxing State, and the property was only introduced for the purpose of sale.<sup>3</sup>

§ 417. **Priority of tax lien.** — Taxes are not like ordinary debts in the sense of the insolvent acts, protecting property in the hands of an assignee.<sup>4</sup> The State is not

poration to a State board of assessors for taxation under the corporation tax act (3 Gen. St., p. 3335) is not conclusive against the corporation." *Arimex Consol. Copper Co. v. State Board of Assessors*, 54 Atl. Rep. 244. (N. J. Sup., 1903.)

<sup>1</sup> *State v. Northern Belle Co.*, 14 M. M. R. 211.

<sup>2</sup> "Exemption is the exception and taxation the rule." *Hope Min. Co. v. Kennon*, 14 M. M. R. 189.

<sup>3</sup> *People v. Horn Silver Min. Co.*, 7 Cent. 220; 105 N. Y. 76; 11 N. East. Rep. 155. "The statute of March 10, 1865, imposing a specific tax upon corporations and companies engaged in mining, smelting and refining ores in Michigan, which provides for the payment of a tax of one and a half cents per ton on all iron ore or mineral obtained and exported from the State before being smelted, but exempts from taxation all that is smelted within the State, is void, as an attempt in effect to impose a tax upon interstate commerce." *Jackson M. Co. v. Auditor-Gen.*, 32 Mich. 488; M. M. D. 366. "A State tax upon bills of lading for the transportation of gold and silver out of the State is void, being in conflict with that clause of the Constitution of the United States prohibiting or limiting the laying of duties on exports or imports." *Brumagim v. Tillinghast*, 18 Cal. 286; M. M. D. 366.

<sup>4</sup> *Stanley v. Little Pittsburg Co.*, 14 M. M. R. 214.

required to wait for judgment, but may distrain and sell property for delinquent taxes and the obligation for taxes takes precedence to all other claims against the property.<sup>1</sup> A tax, however, does not become a lien, unless it is levied under a proper and valid assessment,<sup>2</sup> but where there has been a regular levy and assessment under the statute, the tax collector can distrain the property taxed, regardless of the claims of other creditors, and contrary to the general rule of pleading, in an action to enforce a lien for taxes the State throws upon the property owner the burden of showing that the assessed taxes do not constitute a lien.<sup>3</sup> But in order to make a valid sale of land for unpaid taxes the weight of authorities hold that there should be a substantial, yet strict compliance with those provisions of the statute that are intended for the protection of the delinquent proprietor,<sup>4</sup> and so difficult is it to fulfill all the requirements of the law in respect to tax titles that the investigator of titles always looks with suspicion upon a title which depends upon a tax deed.<sup>5</sup> But notwithstanding the dubious estimation in which a tax deed is held, if all the requirements of the law, as to the preliminary proceedings, have been complied with, the tax deed conveys a good and absolute title, and the purchaser cannot be divested of it, although he may have paid a sum altogether disproportionate to the value of the land.<sup>6</sup>

§ 418. Remedies for illegal taxation. — As a general rule, when the method for avoiding an illegal tax levy is

<sup>1</sup> *Tack v. Weirmet* (Ill.), 2 West. 86.

<sup>2</sup> *L'Engle v. Florida Cent. & W. R. Co.*, 21 Fla. 353.

<sup>3</sup> *Brosemer v. Kelsey* (Ind.), 4 West. 550.

<sup>4</sup> *Tiedeman on Real Prop.*, §§ 759, 760; *Blackwell on Tax Titles*, § 60.

<sup>5</sup> *Ante, idem.*

<sup>6</sup> *Gold Hill Co. v. Caledonia Co.*, 14 M. M. R. 202.

prescribed by statute, it is the duty of the party against whom the illegal levy is made, to follow the provisions of the statute and if he fails to pursue the remedy prescribed, he cannot afterwards assert his claim of the right to equitable relief.<sup>1</sup> The writ of *certiorari* is frequently employed to bring before the court the proceedings touching the collection of the taxes, in order that it may properly investigate the validity of the warrant, or the legality of its issuance,<sup>2</sup> and while there is no doubt of the authority of the court to try such proceedings, where it clearly appears that there has been an illegal taxation,<sup>3</sup> there is grave doubt whether the writ can be resorted to, merely to correct a supposed error in the valuation of the property by the assessor, to whom the duty is assigned by law, and the writ would not be considered as filed for any such purpose, unless the case made in the petition clearly required it,<sup>4</sup> and in no case will taxes, illegally assessed, be set aside on *certiorari*, unless the prosecutor was not subject to the tax.<sup>5</sup> Circuit courts have jurisdiction in matters pertaining to the legality of taxes assessed within the district,<sup>6</sup> and in some of the States, by special statute, the county courts have jurisdiction to determine questions as to erroneous assessments, and where no appeal is taken from their decision, their action in this regard would be final upon the merits of the cause;<sup>7</sup> but justices of the peace are not invested with jurisdiction, either to enforce the State's

<sup>1</sup> *Humphreys v. Nelson* (Ill.), 2 West. 75.

<sup>2</sup> *Harris Cert.*, § 3; *Rich Hill Co. v. Board Eq.*, 19 Mo. App. 172.

<sup>3</sup> *Harris Cert.*, *supra*.

<sup>4</sup> *Shelley County v. Miss. & T. R. Co.*, 16 Lea (Tenn.), 401.

<sup>5</sup> *State v. Morris* (N. J.), 2 Cent. 232.

<sup>6</sup> *Wells Jur. of Cts.*, § 17.

<sup>7</sup> *Rich Hill Coal Min. Co. v. Neptune* (Mo. App.), 2 West. 151.

lien for unpaid taxes or to determine the validity of an assessment.<sup>1</sup>

<sup>1</sup> State ex rel. Gordon v. Hopkins (Mo.), 2 West. 508. "The revenue laws, authorizing boards of equalization to equalize assessments and to add to and increase the same, confer a discretion on such boards, which, however, must be exercised in good faith and not arbitrarily." Cochise County v. Copper Queen Consol. Min. Co., 71 Pac. Rep. 946.



## CHAPTER XXVI.

### ABANDONMENT OF MINING RIGHTS.

**SECTION 419.** Nature and definition of abandonment.

420. Under French and Spanish laws.

421. Question of intent material.

422. Same — *Animus revertendi*.

423. Evidence of abandonment.

424. By partners and cotenants.

425. By lessee and licensee.

426. Same — Tailings and water rights.

427. Pleading abandonment.

428. Effect of abandonment.

§ 419. Nature and definition of abandonment. — Abandonment has been defined as “the relinquishment of a right, or the giving up of something to which we are entitled.”<sup>1</sup> Of course there is no particular difference between the abandonment of a mine and the abandonment of any species of real property or other corporeal hereditament, so far as the law is concerned, for a mine is, in reality, real property.<sup>2</sup> The question of abandonment is of considerable importance in the Western States, where the title is withheld from the locator until performance of certain conditions, for until the transfer of the title by the government, the locator can surrender his right to the possession by abandoning the same,<sup>3</sup> and many conflicts arise between the locator, who has voluntarily quit his

<sup>1</sup> “To intentionally desert.” *Dodge v. Morley*, 1 M. M. R. 63; *Dougherty v. Creary*, 80 Cal. 290; *Mallett v. U. S. Co.*, 1 M. M. R. 17.

<sup>2</sup> *Tiedeman on R. P.*, § 2; *MacSwinney*, § 1.

<sup>3</sup> “Where the alleged abandonment of a claim occurred subsequent to application for patent, and prior to payment and entry, the executive department would be compelled to take jurisdiction to determine the conflicting rights of the parties.” *Wade's Amer. Min. Law*, p. 156.

claim, leaving the possession he acquired by discovery, and before perfecting his right to the claim by a transfer from the government, and the relocater, or the one who finds the abandoned claim and relocates the same in his own right. Therefore, just what acts will constitute an abandonment is a question of frequent inquiry in these conflicts.<sup>1</sup> Generally speaking, the right to any incorporeal hereditament, such as an easement or a right issuing out of real estate, may be lost or destroyed by abandonment.<sup>2</sup> But no legal title to a corporeal hereditament can be lost by abandonment, after the same has vested, unless by estoppel or adverse possession for the statutory period of limitation.<sup>3</sup>

§ 420. Under French and Spanish laws. — At an early day in this country, when the systems of laws in vogue in the different countries that held land in America governed the procedure of the individuals holding estates on the territory of these foreign governments, their procedure in given particulars was of practical importance, to the settler of their domains at least; but since the purchase of all this territory by the United States, the laws of these different countries have ceased to be of practical importance here, except for the instruction that can be drawn from a comparison of their laws with ours in given particulars. Under the French law, abandonment and forfeiture can only result upon grounds of public policy, to subserve the interests of the general public, and the government alone receives the benefit and can take advantage of the

<sup>1</sup> No reason why abandonment be given a special meaning when applied to mining claim. *Mallett v. U. S. Co.*, 1 M. M. R. 17.

<sup>2</sup> *Tiedeman R. P.*, § 605, and cases cited. Also all executory rights to a title. *Ante, idem*, § 739; *Dikes v. Miller*, 24 Tex. 424; *King v. King*, 3 Pa. St. 441; *Barker v. Salmon*, 12 Metc. 32.

<sup>3</sup> *Tiedeman R. P.*, § 739, pp. 559-560.

right.<sup>1</sup> A legal action is necessary under the Spanish laws to work an abandonment or forfeiture of a mine and it is only by a denouncement that the miner can be deprived of his property in the case of an abandonment. This is, in substance, an action triable the same as actions under our own laws, determined on the pleadings, proof, and law submitted to the court, from whose decision the right of appeal is allowed within a given time.<sup>2</sup> But under the laws of both of these countries, the title to the abandoned property would revert to the State or government; it alone could take advantage of the right and it took the property free from all conditions and charges to which it was subjected by the last occupant.<sup>3</sup> It is only under our own liberal system of laws, where the land is held as much for the benefit of the individual citizen as the patrimony of the

<sup>1</sup> See Blanchard & Weeks *Ld. Cas.*, pp. 216, 217; Dupont *Jur. des Mines*; De Fooz, *Hal. Introd. Sec. 8*; De Fooz, *Chap. 22*; *Reg. Prop. des Mines*, Tome 2, p. 235; Dupont *Jur. des Mines*, Tome 1, p. 337.

<sup>2</sup> *Hal. Col.*, pp. 88, 227; Gamboa's *Com. Cap. 18*, Secs. 1-6; Blanchard & Weeks, pp. 218, 219.

<sup>3</sup> *Ante, idem.* "The Spanish mining law of 1849 specifies five different kinds of forfeiture: 1st. Arising from failure to perform the conditions of the grant; 2d. Expiration of six months, from the date of concession, without the work being commenced; 3d. Failure to work, after the commencement of operations, for four consecutive months, or eight interrupted months, in the course of one year; 4th. When, by maldirection of the works, ruin is threatened, and the owner, on being required, shall not secure it within the time designated to him; 5th. When, by an avaricious manner of working, the subsequent enjoyment of the mineral is made difficult or impossible. In the second, third and fourth cases, superior force, which impedes the work, will constitute an exception, it being proved in due form." (*Hal. Col.*, p. 514.) "When a grantee of mines shall come within any one of these five cases mentioned, in which the right to a mine is forfeited, (*se pierde*) the political chief, either by virtue of his office or by denouncement of a party, will make declaration of the termination (*caducidad*) of the grant by the proceedings particularly prescribed in the law." Gamboa's *Com.*, *Cap. 7*, Secs. 4-7; *Hal. Col.* pp. 514, 564, 529; *Hal. Introd.*, *Sec. 8*; Blanchard & Weeks *Ld. Cas.*, p. 219.

government, that the individual is permitted to claim this right, the same as the general government.

§ 421. **Question of intent material.** — Perhaps the best test for determining the question of abandonment, is the intent of the locator at the time when he left his claim.<sup>1</sup> The intent, in fact, constitutes a necessary element to every abandonment, for without the intent to abandon, the mere leaving of property by one in possession would not amount to an abandonment.<sup>2</sup> Nor would a continued absence, for a considerable length of time, constitute an abandonment of one's property, unless for the statutory period of limitation,<sup>3</sup> from which an intent would be presumed as a matter of law, or unless a forfeiture should result, which would have practically the same effect upon the absentee's rights, for the absentee's intent to abandon his property, or facts sufficiently proven from which such intent could reasonably be presumed, must generally be present in order to constitute an abandonment.<sup>4</sup> Lapse of time, however, together

<sup>1</sup> Wade's Amer. Min. Laws, p. 76; Blanchard & Weeks Ld. Cas., p. 216 *et sub.*

<sup>2</sup> St. John v. Kidd, 26 Cal. 263; King v. Edwards, 1 Montana, 235: 11 Colo. 380.

<sup>3</sup> Tiedeman R. P., § 789, p. 559 *et sub.*, and cases cited. "Abandonment is a question of intention." Weill v. Lucerne M. Co., 11 Nev. 200; M. M. D., p. 1. "If, in fact, a person intend to give up his claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact." Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; M. M. D. 1. "The statements of a party alleged to have abandoned are evidence in his favor as disproving an intention to abandon." Noble v. Sylvester, 42 Vt. 146; M. M. D. 1. A right to mine, although not exclusive, is not lost by abandonment, where the grantee occasionally permits others to mine and prospect but does not himself conduct any operations during the statutory period, unless it appears that the exercise of the right to so mine was denied to him. Woodside v. Cicerene, 98 Fed. Rep. 1.

<sup>4</sup> Blanchard & Weeks Leading Cases in Mines, Minerals and Mining Water Rights, p. 216; Richardson v. McNulty (a leading case), 24 Cal.

with other circumstances and facts, if for a sufficient period, would constitute very good evidence, and go a great way toward proving the intent of the locator to abandon his claim,<sup>1</sup> but time is not an essential element to abandonment, and if the intent is present, an abandonment could take effect contemporaneous with the departure of the locator from his claim, for with the intent to abandon and a relinquishment of possession, the abandonment is complete and this could take effect the same instant.<sup>2</sup>

§ 422. *Same — Animus revertendi.* — Abandonment is a mixed question of law and fact,<sup>3</sup> and if a person quits paying his assessments or stops work, in pursuance to an intent to desert the object of his expenditure or labor, it is an abandonment in fact.<sup>4</sup> But proof of an intent to return overthrows an allegation of abandonment.<sup>5</sup> Mere non-user is not conclusive evidence of abandonment,<sup>6</sup> and the *animus revertendi* is the final test of whether or not an abandonment did, in fact, occur.<sup>7</sup> Accordingly, bringing suit to recover the property claimed to have been abandoned,<sup>8</sup> and leaving tools or machinery upon the ground,<sup>9</sup>

339; *Stephens v. Mansfield*, 11 Cal. 365; *McGarenty v. Byington*, 12 Cal. 426; *Hosford v. Metcalf* (Iowa, 1901), 84 N. W. 1054.

<sup>1</sup> *Ante, idem.* *Myers v. Spooner*, 9 M. M. R. 519.

<sup>2</sup> *Blanchard & Weeks Ld. Cases, supra*; *Karns v. Tanner*, 5 M. M. R. 289; *Dernz v. Ross*, 1 M. M. R. 1; *Mallett v. U. S. Co.*, 1 M. M. R. 17. Where the intent was to return on condition, abandonment held absolute. *Trevastus v. Pearl*, 111 Cal. 599.

<sup>3</sup> *Oreamuno Co. v. U. S. Co.*, 1 M. M. R. 32.

<sup>4</sup> *Ante, idem.* *Grove v. Davidson*, 2 *Id.* 517.

<sup>5</sup> *Bell v. Bed Rock Co.*, 1 M. M. R. 45.

<sup>6</sup> *Seaman v. Vaudray*, 13 M. M. R. 62; *Dodge v. Marden*, 1 *Id.* 63.

<sup>7</sup> *Stone v. Geyser Co.*, 1 M. M. R. 59.

<sup>8</sup> *Richardson v. McNulty*, 1 M. M. R. 11.

<sup>9</sup> *Morenhout v. Wilson*, 1 M. M. R. 53; *Harkness v. Burton*, 9 *Id.* 318. No abandonment would result where continued possession could be shown for six years. *Ureka M. & M. Co. v. Knight*, 133 Cal. 544; 65

have been held to be competent facts as evidence of an intent to return.

§ 423. **Evidence of abandonment.** — A party who relies upon an abandonment to build up a right in himself to the abandoned property, is generally under the necessity of establishing, by competent proof, the facts upon which the abandonment and his own asserted right depend.<sup>1</sup> Abandonment is a mixed question of law and fact, and is properly submitted to the jury.<sup>2</sup> The intention of the party alleged to have abandoned his property is the gist of the action,<sup>3</sup> and before an abandonment can take place, it must appear that he left the same free to the appropriation of the next comer, without any intention to repossess or reclaim it and regardless of what may become of it in the future.<sup>4</sup> Lapse of time, and other circumstances, in the absence of direct proof of the intention of the party alleged to have abandoned his property, are properly admitted to show such intent,<sup>5</sup> although there would be no pre-

Pac. Rep. 1091. There can be no such thing as a conditional abandonment, as where party intended to return if the claim proved valuable: the abandonment is absolute. *Trevaskis v. Pearl*, 111 Cal. 599; 44 Pac. Rep. 246.

<sup>1</sup> *Doak v. Brubaker*, 1 Nev. 217; *Richardson v. McNulty*, 24 Cal. 339; B. & W. L. C. 206.

<sup>2</sup> *Weill v. Lucerne M. Co.*, 11 Nev. 200; *Karns v. Tanner*, 66 Pa. St. 297; *Doak v. Brubaker*, *supra*; *Oreamuno v. Uncle Sam G. & S. M. Co.*, 1 Nev. 215.

<sup>3</sup> *Weill v. Lucerne Min. Co.*, *supra*; *St. John v. Kidd*, 26 Cal. 263; *Mallett v. Uncle Sam M. Co.*, 1 Nev. 194; *Warring v. Crow*, 11 Cal. 366; *Wade's Amer. M n. Laws*, p. 59, § 33; *McGarrity v. Byington*, 12 Cal. 431.

<sup>4</sup> *Richardson v. McNulty* (a leading case) 24 Cal. 339; *Blanchard & Weeks Ld. Cas.*, p. 206.

<sup>5</sup> *Davis v. Gale*, 32 Cal. 26; *Wade Amer. Min. Laws*, p. 59, § 33; *Davis v. Butler*, 6 Cal. 510; *Warring v. Crow*, 11 Cal. 366; *Mallett v. U. S. G. & S. M. Co.*, 1 Nev. 189; *McGarrity v. Byington*, 12 Cal. 431.

sumption of abandonment from mere lapse of time short of the statutory period.<sup>1</sup> On the other hand, it is competent for the opposite party to prove, in rebuttal, any acts explanatory of his leaving, which would negative the allegation of abandonment, or go to show that it was accompanied with an intent to return.<sup>2</sup> His statements made at the time of leaving would be competent evidence in his favor, as disproving an intention to abandon his property.<sup>3</sup> And since the proof of one's intention must necessarily depend largely upon circumstantial evidence, the fact that tools had been left upon the ground might properly be considered as a circumstance consistent with an intent to return,<sup>4</sup> and generally any other facts or circumstances of a similar nature, consistent with the issues, should go to the jury.<sup>5</sup>

§ 424. By partners and cotenants. — No doctrine is more thoroughly settled in the law of real property than that the possession of one partner or cotenant is the possession of all.<sup>6</sup> So long as any one remains in possession

<sup>1</sup> Partridge v. McKinney, 10 Cal. 181; Wade, p. 59; Mallett v. U. S. G. & S. M. Co., *supra*.

<sup>2</sup> Bell v. Bed Rock Co., 36 Cal. 214.

<sup>3</sup> Noble v. Sylvester, 42 Vt. 146. And it has been held that evidence of a refusal to sell on the part of plaintiff was competent to go in as tending to disprove abandonment. Bell v. Bed Rock Co., 36 Cal. 214. And a judgment in favor of the plaintiff and against a third party for possession of the same tract is admissible to rebut evidence of abandonment. Richardson v. McNulty, 24 Cal. 389; Wade Amer. Min. Laws, p. 60, § 83.

<sup>4</sup> Harkness v. Burton, 39 Iowa, 101; Morenhout v. Willson, 53 Cal. 263.

<sup>5</sup> *Ante, idem*. Great latitude and range in the testimony should be allowed in the case of abandonment. Bell v. Bed Rock Co., 1 M. M. R. 45; 36 Cal. 214. "Leaving tools upon the ground considered as evidence against abandonment." Harkness v. Burton, 39 Iowa, 101; M. M. D. 1.

<sup>6</sup> Tiedeman R. P., § 688. "Unless there is some decisive act to show an ouster, the possession of one tenant in common of a mining claim inures to the benefit of all." Van Valkenburg v. Huff, 1 Nev. 142; M. M. D. 372.

of the common property there could be no abandonment or forfeiture of the property, for the possession of the one would inure to the benefit of all, and is in fact indivisible and in common.<sup>1</sup> This is true not only as to third parties, but also as between the partners or cotenants themselves, and no abandonment or forfeiture could result in favor of one and against the others, where any one remained in possession, unless the possession of that one was clothed with all the essentials of an adverse possession, being open and notorious, exclusive and hostile.<sup>2</sup> The absence of one or more of the cotenants for any period short of the statute of limitations, or even longer, unless adverse, would not operate as an abandonment of the interest of such tenants in favor of their cotenants, nor would there be any presumption of abandonment, so long as their cotenants continued in possession.<sup>3</sup> But the length of time they were away, together with other facts and circumstances, would be competent evidence tending to

<sup>1</sup> *Sawyer v. Turner*, 16 M. M. R. 360.

<sup>2</sup> *Susquehanna Co. v. Quick*, 1 M. M. R. 202. See B. & W. Ld. Cas., p. 225. "But if one tenant in common, after having become associated with his cotenants in the development of the claim, voluntarily leaves it in the possession of his companions, and refuses to bear his proportion of the expenses incurred by them in the development of the same, and should afterwards bring his action to recover his interest, undoubtedly, upon a proper application, the equity side of the court would defer his recovery until he had paid his full proportion of the expense incurred in the development and improvement of the claim; and, on the other hand, if he had been successfully ousted from his possession or rights, the persons so ousting him, or those claiming under them, can acquire no title in the claim adverse to him short of the statute of limitations, and of course could not ask the interposition of equity." *Mallett v. U. S. G. & S. M. Co.*, 1 Nev. 189; B. & W. L. C. 225.

<sup>3</sup> *Blanchard & Weeks Ld. Cas.*, pp. 224-225 *et sub.*; *Coleman v. Clemens*, 5 M. M. R. 247. The possession of one tenant in common inures to the benefit of all until such possession becomes adverse. *Mallett v. Uncle Sam M. Co.*, 1 Nev. 194; M. M. D. 1.



prove an abandonment on the part of such absent tenants,<sup>1</sup> and if, by the rules or articles of association, the absence of any cotenant was to work a forfeiture of his interest, after a stated period, then, after this period, a forfeiture would result of such absent tenant's interest, without further showing.<sup>2</sup>

§ 425. *By lessee and licensee.* — An abandonment of a mine by a lessee,<sup>3</sup> or licensee,<sup>4</sup> and a failure to work and pay royalty, is a termination of such lease or license, as effectually as if the same had been voluntarily surrendered. But the evidence upon which an abandonment of a lease or license could be predicated would necessarily vary, according to the nature of the ore or mineral to be mined under such lease or license.<sup>5</sup> For instance, evidence that would justify a court in finding that there had been an abandonment of an oil, or gas lease, where the estate would be held to end when the unsuccessful search stopped,<sup>6</sup> might not

<sup>1</sup> *Mallett v. U. S. G. & S. M. Co.*, 1 Nev. 189; *Warring v. Crow*, 11 Cal. 366; *Strong v. Ryan*, 46 Cal. 33.

<sup>2</sup> *Ante, idem.* *Van Schmidt v. Huntington*, 1 Cal. 55; *In re Brain, L. R.*, 18 Eq. 389. As to a forfeiture by a joint-stock company, see *Westcott v. Minn. Min. Co.*, 23 Mich. 145. But see *Wisconsin v. McNulty*, 25 Cal. 230.

<sup>3</sup> *Van Meter v. Chicago & C. Com. Co.*, 88 Iowa, 92; *Porter v. Noyes*, 47 Mich. 55; *Eaton v. Allegheny Co.*, 122 N. Y. 416; *Buhl v. Thompson*, 3 Penny. 267; *Bostwick v. Coal Co.*, 129 Penn. 592; *Riddle v. Melton*, 147 Pa. 30; *Borhart v. Lockwood*, 152 Pa. 82; *Cowan v. Radford Iron Co.*, 83 Va. 547; *Hodgson v. Parkins*, 84 Va. 706; *Bluestone Coal Co. v. Bell*, 88 W. Va. 297.

<sup>4</sup> *Beatty v. Gregory*, 17 Iowa, 109; *New Jersey Co. v. Wright*, 32 N. J. Eq. 248; 9 M. M. R. 332.

<sup>5</sup> *Plummer v. Hillside C. & I. Co.*, 160 Pa. 433. Ceasing to bore for oil for an unreasonable time will operate as an abandonment of lease. *Foster v. Oil & Gas Co.*, 90 Fed. Rep. 178.

<sup>6</sup> *Venture Oil Co. v. Fretta*, 152 Pa. St. 451. A failure to proceed with a test for oil after a test well goes dry, is an abandonment of the lease. *Aye v. Phil. Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555. Lessee of

be sufficient evidence to terminate the rights of a lessee, under a developed coal lease, where the right to mine was measured in the agreement by a fixed rent or royalty.<sup>1</sup> And, in any event, no failure to work by a lessee or licensee, short of the statutory period of limitations, could be taken advantage of by anyone, except the lessor or licensor.<sup>2</sup>

§ 426. *Same — Tailings and water rights.* — To suffer tailings<sup>3</sup> and slag<sup>4</sup> to flow freely without effort to confine them, is strong evidence of an abandonment of all right thereto, and will be held to deprive the owner of any interest therein, unless the nature and topography of the country would render an artificial obstruction unnecessary,<sup>5</sup> or there is other evidence to overcome the evidence of an intent to forsake the same. And permitting water to flow away, unrestrained, would also work an abandonment of any right thereto,<sup>6</sup> and after the abandonment of such right no

stone quarry held not to have abandoned the same, so as to prevent recovery from one who buys it from the lessor and takes away the stone quarried by him. *Russell v. Stratton* (Pa.), 50 Atl. Rep. 975. Where lessee under an oil lease plugs his well and pulls the casing and takes down the rig from a two-year-old well but the lease binds him to drill another, he will not be held to have abandoned the lease. *Aherns v. Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739 (1901). A lessee of an oil lease who quit the first well, because non-productive, held to abandon same. *Stage v. Boyer*, 188 Pa. St. 560; 38 Atl. Rep. 1035.

<sup>1</sup> *Plummer v. Hillside C. & I. Co.*, 160 Pa. 488.

<sup>2</sup> *Bartley v. Phillips*, 165 Pa. 325. Same case, 179 Pa. 175. There is no abandonment of a license to mine, where zinc was excavated but it was not known it was of any value, as lead only was mined in the locality, and the zinc was afterwards found to be of value. *Hosford v. Metcalf* (Iowa, 1901), 84 N. W. 1054.

<sup>3</sup> *McGoon v. Ankeny*, 1 M. M. R. 9.

<sup>4</sup> *Jones v. Jackson*, 14 M. M. R. 72; *Dougherty v. Creary*, 1 M. M. R. 35.

<sup>5</sup> *Jones v. Jackson*, *supra*.

<sup>6</sup> *Dougherty v. Creary*, *supra*.

revivor would occur by an attempt to sell the lost right,<sup>1</sup> any more than an attempted recapture of the water, after it had been captured by another appropriator.<sup>2</sup> But an abandonment of water rights would **not** be implied by the sale of a claim whereon the same was used,<sup>3</sup> and no non-user alone, short of the period of the statute of limitations relating to real property, would, of itself, be sufficient to establish an abandonment of water rights.<sup>4</sup>

§ 427. **Pleading abandonment.**—It has been held that an abandonment could be shown under a general denial in an action of ejectment, since it involved a denial of the plaintiff's possession at the time of defendant's entry,<sup>5</sup> although a forfeiture could not be taken advantage of under a general denial.<sup>6</sup> The rules of pleading would seem to indicate that abandonment should be specially pleaded, however, since it is a legal conclusion from the facts that go to show the abandonment, but the necessity of specially pleading the action would be controlled, largely, by the code provisions and practice acts of the different States.<sup>7</sup> The parties to the action are entitled to a definite issue, as well as the court, and in such action the issues

<sup>1</sup> *Davis v. Gale*, 4 M. M. R. 604.

<sup>2</sup> *Barkley v. Tieleke*, 4 M. M. R. 666.

<sup>3</sup> *Dodge v. Morden*, 1 M. M. R. 63.

<sup>4</sup> If the water right to a placer claim is abandoned, the claim would be held abandoned, as there can be no abandonment of the one without the other. *Schwab v. Beam*, 86 Fed. Rep. 41. "The law will not presume an abandonment of property in a dam and ditch for mining purposes from lapse of time." *Partridge v. McKinney*, 10 Cal. 181; M. M. D. 2.

<sup>5</sup> *Morenhout v. Wilson*, 52 Cal. 263 (overruling *Bell v. Brown*, 22 Cal. 681).

<sup>6</sup> *Ante, idem.*

<sup>7</sup> *Wade's Amer. Min. Laws*, § 8, pp. 8-9; *Bell v. Brown*, 22 Cal. 671, *supra*.

cannot be definitely framed and formed unless the facts constituting the action, as well as the defense, are pleaded.<sup>1</sup> And although one in possession of public land is entitled to maintain an action to test the validity of a party's title who is out of the possession,<sup>2</sup> it would not be sufficient, in such an action, for the defendant to set up an abandonment by the plaintiff, of his alleged title, and possession by the defendant after the commencement of the suit, for the defendant would have to go further and show subsequently acquired rights of his own in regard to the land in controversy, or his defense of the weakness of the plaintiff's title would be unavailing.<sup>3</sup>

§ 428. **Effect of abandonment.**— An abandonment cannot operate to vest the title or transfer the property abandoned to another, but wherever it takes effect it simply operates as a destruction of the title, or a loss of the rights of the party committing the act.<sup>4</sup> If the owner of a mining claim abandons his claim before the legal title to the land has become vested in such claimant, this will operate as an utter extinguishment of any rights he may have acquired while in possession of the claim; and while there cannot be, technically speaking, an abandonment of a claim after the title has passed,<sup>5</sup> the doctrine applies until the

<sup>1</sup> Dutch Flat Water Co. v. Mooney, 12 Cal. 534; Blanch. & Weeks Ld. Cas., p. 225.

<sup>2</sup> Pralus v. Pacific G. & S. M. Co., 35 Cal. 30; Merced Mining Co. v. Fremont, 7 Cal. 319; Smith v. Brannan, 13 Cal. 107; Boggs v. Merced Mining Co., 14 Cal. 279; Curtis v. Sutter, 15 Cal. 259; Head v. Fordyce, 17 Cal. 149.

<sup>3</sup> Blanchard & Weeks Ld. Cas., pp. 225-226, and cases cited.

<sup>4</sup> Tiedeman on R. P., § 739, p. 559. But see, *contra*, Dutch Flat Water Co. v. Mooney, 12 Cal. 534. Also see Gluckauf v. Reed, 22 Cal. 469; Dyson v. Bradshaw, 23 Cal. 528.

<sup>5</sup> Wade's Amer. Min. Laws, p. 60. A grant of mineral with a covenant that grantee is to mine and pay royalty, on abandonment, is divested. Paine v. Griffith, 86 Fed. Rep. 452.

owner has acquired the legal title to the claim, and if he should abandon his claim at any time when he has but a possessory right thereto, he would afterwards, with respect to that claim, be upon the same footing as any other third party, who had never been in possession of the land.<sup>1</sup> As in the case of a forfeiture for a failure to work, an abandonment must be clearly established by the party setting up such abandonment as a basis for his own rights.<sup>2</sup> But while forfeiture for a failure to work may be cured by a resumption of work at any time before the rights of third parties have intervened, an abandonment operates as an actual divestment of the rights of the owner and the relocation of an abandoned claim is governed by the same rules that would apply in the original location of such claim.<sup>3</sup>

<sup>1</sup> *Davis v. Butler*, 6 Cal. 510. As to water right see *Dougherty v. Creary*, 30 Cal. 290; *Jones v. Jackson*, 9 *Id.* 237.

<sup>2</sup> *Blanchard & Weeks Ld. Cas.*, pp. 222 and 223 *et sub.*

<sup>3</sup> *Dutch Flat Co. v. Mooney*, 12 Cal. 534. A relocation dates only from the relocation, although designated as an amendment in the location certificate. *Cheesman v. Shred*, 40 Fed. Rep. 787.

## CHAPTER XXVII.

### ADVERSE POSSESSION, CLAIMS, AND CONTESTS.

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§ 429. Mining rights, under limitation statutes. — A mine, or quarry, as a part of the solum, from the surface to the center of the earth, is as much subject to statutes of limitation as any other of the elements, going to make up the term, lands, tenements, and hereditaments,<sup>1</sup> and a title by adverse possession may be acquired to mines and minerals, either by or against an individual or corporation.<sup>2</sup> Before

<sup>1</sup> *Smith v. Stacks*, 10 B. & S. 701; *MacSwinney on Mines*, etc., p. 524. Statute applicable to all corporeal hereditaments. *Armstrong v. Caldwell*, 13 M. M. R. 252.

<sup>2</sup> *Ante, idem.* *Thew v. Wingate*, 10 B. & S. 714. Statute does not run against government. *Vansickle v. Haines*, 15 M. M. R. 201; *Mining Co. v. Ferris*, 8 M. M. R. 91. The U. S. statute is as follows: § 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or territory where the same

a severance of the title to mineral in place from the title to the surface, a title to mines or minerals could also be acquired by limitation, on the part of one having the exclusive right and possession of the surface,<sup>1</sup> and even though one had neither right nor possession of the surface, if possession of mines or minerals is held, in the statutory manner, and for the requisite period, a title would be acquired as to them, as a separate subject-matter.<sup>2</sup> But a title to mineral, by adverse possession, is not aided by surface rights or occupancy; it must be actual, as distinguished from constructive possession and separate and distinct from the occupancy of the surface.<sup>3</sup>

§ 430. What possession considered adverse. — The rule of law is well settled that mere naked possession of land will enable the person holding such possession to retain the land as against all the world, except the true owner, but before the possession of the party in possession will vest in him a title to the land, it must be adverse to

may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. (Act of Congress July 9, 1870, Ch. 285, § 18.)

<sup>1</sup> *Thew v. Wingate*, 10 B. & S. 714, 721; *MacSwiney*, p. 526.

<sup>2</sup> *Ante, idem.* *Fleming v. Howden*, 6 Sess. Cas. 788. "Occupation of land under paper title, by mining operations, continuous, notorious and visible, may constitute actual adverse possession. Mining, though a less general industry, is entitled to protection as well as agriculture." *Wilson v. Henry*, 40 Wis. 594; *s. c.* 35 *Id.* 241; *M. M. D.* 345.

<sup>3</sup> *Armstrong v. Caldwell*, 13 Mor. Min. Rep. 252. Non-user alone will not bar the rightful owner's title to mineral. *House v. Palmer*, 9 Ga. 497; *Perkins v. Stockwell*, 131 Mass. 529; *Monroe v. Bowen*, 26 Mich. 523; 20 Am. & Eng. Enc. Law (2 Ed.), 758. Secret mining will not put statute in operation. *Bonomi v. Backhouse*, 96 E. C. L. 622; *Lewey v. Coal Co.*, 166 Pa. St. 536; *Plummer v. Hillside Coal Co.*, 104 Fed. Rep. 208.

and independent of the real owner.<sup>1</sup> The possession of the lessee, or agent of the true owner, is never considered as adverse to such owner's possession but, on the contrary, the possession of the agent or lessee is deemed in law the possession of the owner.<sup>2</sup> As to within what time action must be brought to oust a person in adverse possession of a mining claim, reference must be had to the local statute, as the different States have adopted different periods of limitation in regard to actions for possession of mining claims.<sup>3</sup> Parties in joint possession of a claim are governed by the general rule that obtains in the case of tenants in common, and before the possession of one such tenant will be considered as adverse to his cotenants, there must have been acts on his part sufficient to indicate his intention to exclude his cotenants; there must be evidence that he was in actual possession of the claim, and that he held the claim adversely to his cotenants for the entire statutory period.<sup>4</sup>

<sup>1</sup> *Ege v. Medlar*, 82 Pa. St. 86. A deed fraudulently obtained cannot be foundation for an adverse possession, nor will a subsequent working under such deed make the possession adverse. *Livingston v. Peru Iron Co.*, 9 Wend. 518; *s. c.* 2 Paige Ch. 390. But generally an entry under an adverse claim of title and a subsequent digging of ore, or operation of the mines, will, in law, constitute an adverse possession of the land so held. *West v. Lonler*, 9 Humph. (Tenn.) 762; *Aikin v. Buck*, 1 Wend. 467; *Calvin v. McCune*, 39 Iowa, 502; *Jackson v. Olitz*, 8 Wend. 440; *McDonnell v. McGinty*, 10 Irish L. R. 514; *Ewing v. Burnet*, 11 Peters, 41.

<sup>2</sup> Possession is never adverse when with the consent of true owner. *Gould v. Martyn*, 19 C. B. (N. S.) 732. Where there has been no severance of titles, adverse possession of surface for statutory period bars title to coal beneath. *Delaware Canal Co. v. Hughes*, 2 Lack. L. News, 21. Adverse possession for the statutory period will not confer title to minerals previously severed from the surface by deed. *Catlin Coal Co. v. Lloyd*, 176 Ill. 275; 180 *Idem*, 398; 54 N. E. Rep. 214. As to when possession by cotenant is adverse see *Thompson v. Ferry* (Ariz.), 56 Pac. Rep. 741; *Susquehanna Co. v. Quick*, 61 Pa. St. 32.

<sup>3</sup> See different statutes; 420 *Mining Co. v. Bullion Co.*, 11 M. M. R. 608; *Mining Co. v. Bullion M. Co.*, 9 Nev. 240; 3 *Sawyer*, 659.

<sup>4</sup> *Mining Co. v. Taylor*, 100 U. S. 37; *Wade*, p. 20; *Coleman v. Clemens*, 23 Cal. 245.



No rights can be initiated by a trespasser, and where land has been granted to private parties, others have no right to enter upon the land afterward and prospect for mineral.<sup>1</sup>

§ 431. Acts amounting to adverse possession. — Acts of ownership, sufficient to constitute adverse possession, under the statute of limitations, must have reference to the mines, or mineral, as such, as distinguished from the surface of the soil.<sup>2</sup> Executing a lease, and using stone and timber, at different times, during the statutory period, accompanied by payment of taxes, under color of title and claim of right, will constitute adverse possession.<sup>3</sup> So will the quarrying of rock; burning of lime kiln and cutting of timber and building of sheds, continued for the statutory period.<sup>4</sup> Adverse holding and user of a water right, for the statutory period;<sup>5</sup> continuous, open and notorious possession for the statutory period, of a mining ditch or drain;<sup>6</sup> open and notorious mining, although not in actual possession,<sup>7</sup> and notorious, peaceful, adverse possession for the statutory period after severance of the mineral title, by the purchaser of the surface, would give a statutory title, although the vendor had, in the deed, reserved the title to the ore.<sup>8</sup>

§ 432. Acts not amounting to adverse possession. — Temporary occupancy only, under color of a decree, with-

<sup>1</sup> *Franceour v. Newhouse* (C. C. N. D. Cal.), 40 Fed. Rep. 618; Wade, pp. 99-100 and cases cited.

<sup>2</sup> *Caldwell v. Copeland*, 1 M. M. R. 189.

<sup>3</sup> *Calvin v. McCune*, 1 M. M. R. 223.

<sup>4</sup> *Moore v. Thompson*, 1 *Idem*, 221.

<sup>5</sup> *Davis v. Gale*, 4 M. M. R. 604.

<sup>6</sup> *Campbell v. West*, 1 M. M. R. 218.

<sup>7</sup> *Armstrong v. Caldwell*, 13 M. M. R. 253.

<sup>8</sup> *House v. Palmer*, 13 M. M. R. 104.

out a deed, would not amount to a disseizin,<sup>1</sup> as the party whose title is lost, or remedy is barred, is entitled to stand on the letter of the statute and insist upon a strict compliance with its conditions.<sup>2</sup> An owner of a mine who works the same as often as the custom of the country justifies and the nature of the business will permit, cannot be deprived of his property by the adverse claim of a tax purchaser;<sup>3</sup> no possession of the surface alone would be construed as a holding adverse to the mine owner, after severance of the titles;<sup>4</sup> taking temporary supplies of coal, for fuel, would not be an adverse holding under the statute,<sup>5</sup> nor could any possession be considered adverse that was not open and notorious, exclusive, hostile and continuous.<sup>6</sup>

§ 433. Same — With or without color of title. — To constitute an adverse possession, where there is no paper title, there must be an actual occupancy — a *pedis possessio* — or a substantial inclosure.<sup>7</sup> Evidence of adverse possession, in such case, is always strictly construed,<sup>8</sup> and to enable a trespasser to acquire title, by adverse holding, a permanent use and occupancy must be shown.<sup>9</sup> But where the entry is rightful, or under claim and color of title, the same strictness of proof is not required, and adverse pos-

<sup>1</sup> Anderson v. Harvey, 7 M. M. R. 279.

<sup>2</sup> Wilson v. Henry, 1 M. M. R. 152.

<sup>3</sup> Stephenson v. Wilson, 13 M. M. R. 408.

<sup>4</sup> Arnold v. Stevens, 1 M. M. R. 176; Rich v. Johnson, *Idem*, 173; Hodgkinson v. Fletcher, same.

<sup>5</sup> Jackson v. Stoetzel, 1 M. M. R. 228.

<sup>6</sup> "No adverse possession can be acquired by secret mining." Hamilton v. Southern Nevada Mining Co., 15 M. M. R. 315; Crandal v. Woods (Cal.), 1 M. M. R. 604; McBee v. Loftis, 3 M. M. R. 222; Armstrong v. Caldwell, 13 M. M. R. 252.

<sup>7</sup> Jackson v. Olitz, 5 M. M. R. 208; National Co. v. Powers, 1 M. M. R. 284, case of a squatter on patented mill site.

<sup>8</sup> *Ante, idem.* MacSwinney on Mines, p. 41.

<sup>9</sup> Jackson v. Stoetzel, 1 M. M. R. 228.

session of a part only of a mine would be held a sufficient adverse holding of the whole.<sup>1</sup>

§ 434. **Same — Non-user alone not sufficient.** — Mere non-user alone of mineral purchased,<sup>2</sup> or excepted or reserved,<sup>3</sup> in a sale of the land, will not extinguish the ownership, but to effect a title by adverse possession, there must be some overt and hostile acts, contrary to the rights of the owner.<sup>4</sup> In England mere non-user will not divest a title, as against the rightful owner, nor are any presumptions indulged in as against such owner, by the fact of non-user, as the fact is recognized that mines are often purchased, without desire to exhaust them, but so held in reserve until other mines shall be exhausted, and,<sup>5</sup> accordingly, non-user, coupled with a permissive expense by a surface owner, upon the mine, or minerals, without claim by the owner, has been held insufficient to overthrow the title of the mine owner.<sup>6</sup>

§ 435. **Same — When possession stealthy or wrongful.** — A trespasser, who works through into the land of an adjoining owner and extracts ore, can acquire no rights to such mineral by reason of his wrongful acts and could

<sup>1</sup> *Jackson v. Oltz, supra*; *McDowell v. McGinty*, 10 Ir. L. R. 527; *Wied v. Holt*, 9 M. & W. 672.

<sup>2</sup> "Purchase and exception are probably on a similar footing, as to non-user." *MacSwinney*, p. 528.

<sup>3</sup> *Smith v. Lloyd*, 9 Exch. 562; *Seaman v. Vawrey*, 16 Ves. 392. "Non-user of a mine reserved in a deed, will not, of itself, extinguish ownership." *Marvin v. Brewster Iron Min. Co.*, 13 M. M. R. 40.

<sup>4</sup> "Only by user or some unequivocal act of possession can a person who has excepted mines from a sale, be dispossessed by lapse of time." *MacSwinney on Mines, etc.*, p. 528.

<sup>5</sup> *Crang v. Adams*, 5 B. P. C. 588; *Hodgkinson v. Fletcher*, 3 Doug. 81; *MacSwinney*, p. 527.

<sup>6</sup> *MacSwinney*, p. 527; *Adair v. Shaftoe*, 19 Ves. Jr. 156.

not defend, for such trespass, on the length of time he had continued to perpetrate such imposition, or claim title to the ore, even though he had continued his wrongful possession and working for the statutory period of limitation.<sup>1</sup> Possession that will ripen into a title must amount to notice of a claim of ownership,<sup>2</sup> and a possession by stealth, or secret mining, can never amount to adverse possession.<sup>3</sup> Where the possession is wrongful, title would never be extended beyond the actual physical possession,<sup>4</sup> and a title acquired, by wrongful possession, for the statutory period, as to one or more veins, or strata of ore, would not be extended, by implication, to any underlying veins, but would be limited to those where actual possession had obtained.<sup>5</sup>

§ 436. **When possession of surface not adverse.** — The common law rule that whoever owns the surface of lands is entitled to all beneath the surface, has but a limited application to mining property,<sup>6</sup> and especially where there is a double ownership in the property, or an ownership of the surface by one party, with the title to the minerals in another.<sup>7</sup> It has been held that this doctrine could not be invoked to vest the title to a vein or lode which extended into a claim on its downward dip, but had its top or apex

<sup>1</sup> *Dartmouth v. Spittle*, 19 W. R. 444; *Ashton v. Stock*, 6 Ch. D. 726; *Wilkinson v. Proud*, 11 M. & W. 83. See, *contra*, *Williams v. Pomeroy Coal Co.* (6 M. M. R. 95), where it is said: "Underground and unknown trespasses do not differ from other trespasses, and when recovery is barred, all consequences resulting therefrom are barred."

<sup>2</sup> *Moore v. Thompson*, 1 M. M. R. 221.

<sup>3</sup> *Hamilton v. Southern Nevada M. Co.*, 15 M. M. R. 315.

<sup>4</sup> *McDowell v. McGinty*, 19 Ir. L. R. 527; *MacSwiney Mines & Min.*, p. 527; *Dartmouth v. Spittle*, 19 W. R. 527.

<sup>5</sup> *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. (N. S.) 186, 189.

<sup>6</sup> *Montana Co. v. Clark* (C. C. D. Mon.), 42 Fed. Rep. 626.

<sup>7</sup> *Tiedeman R. P.*, § 10, p. 11.

outside the limits of the claim, and the owner of such claim could not acquire a title to the vein or lode extending into his claim, by mere possession of the surface, even though the government had not granted such lode or vein to any one else.<sup>1</sup> To constitute adverse possession of a mine or minerals the claimant must be in actual possession of the mine or minerals claimed and possession of the surface after a severance of the titles would not be such possession.<sup>2</sup> An occupant of the surface who has not himself taken possession of the minerals could not acquire a title thereto or bar the right of the owner of the minerals on account of the latter's failure to exercise the right to dig the same, for he has not himself been in adverse possession of such mineral.<sup>3</sup> But if such surface owner, after severance, should reduce the mineral to his possession, or if he should continue, for the statutory period, to dig and search for such mineral, he would thereby reduce the same to his possession, and such adverse possession would vest in him

<sup>1</sup> *Montana Co. v. Clark*, *supra*. See R. S. U. S., Secs. 2322 and 2336. "The statute provides that when two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. The language here used is such that there can be little doubt that it refers to veins which unite in their downward course. There is another provision in the same section for cases where veins unite in crossing. This would only occur where one vein so far departs from the vertical as to pass within the side lines of an adjoining claim, in which the vein had less dip. So long as the veins are distinct, and can be separately followed, they cannot be said to unite. The statute is merely intended to prevent confusion. (Rev. Stat. U. S., § 2336.) Section 2322 of the revised statutes gives quite extensive privileges to the locator, both with reference to the exclusive enjoyment of the surface within his boundaries and the right to all veins or lodes therein included." R. S. U. S., 2336; Wade, p. 65.

<sup>2</sup> *Montana Co. v. Clark*, *supra*; *Hodgkinson v. Fletcher*, 3 Doug. 31; *Arnold v. Stevens*, 1 M. M. R. 176.

<sup>3</sup> *Ante*, *idem*. *Caldwell v. Copeland*, 1 M. M. R. 189; *Rich v. Johnson*, 1 M. M. R. 173.

a perfect title to the minerals.<sup>1</sup> The possession of the minerals would not be aided, however, by possession of the surface, and in order to vest a title thereto in the occupant he must remain in actual and exclusive continued and hostile possession thereof for the statutory period.<sup>2</sup>

§ 437. **Approach to mineral immaterial.** — When there has been an actual holding of mineral for the statutory period the title would follow such possession, regardless of the occupancy of the surface, for the adverse possession is the fact essential to the title, and the manner of approach — whether laterally or vertically — is immaterial.<sup>3</sup> And even though a mine or quarry is wholly surrounded by galleries, if there has been an actual, adverse possession, for the statute period, of a clearly defined portion of the ore, a title by limitation would result, regardless of the means by which the occupancy was exercised.<sup>4</sup>

§ 438. **As to running water.** — There is no presumption of a grant of the use of water when the adverse use was hostile and without the acquiescence of the owner.<sup>5</sup> But if one who has the prior right of usage of the water permits another to acquire and hold for the statutory period,

<sup>1</sup> *Armstrong v. Caldwell*, 68 Pa. St. 284.

<sup>2</sup> *Ante, idem.* See *420 Mining Company v. Bullion M. Co.*, where it is held that adverse possession for the statutory period not only bars the remedy, but extinguishes the right and vests title in the adverse holder (2 Sawyer, 450). Eminent authorities differ as to the effect of the statute in this regard, some holding it only takes away the remedy (see *Tiedeman R. P.*, § 711), and others contending that it conveys the title. *Bliss C. P.*, § 205 *et sub.*

<sup>3</sup> *Dartmouth v. Splitle*, 19 W. R. 445; *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. 186; *Ashton v. Stock*, 6 Ch., p. 726; *Seaman v. Vawbrey*, 16 Ves. Jr. 392; *Mawson v. Fletcher*, 6 Ch. 94; 10 Eq. 219.

<sup>4</sup> *Ashton v. Stock*, 6 Ch., p. 726.

<sup>5</sup> *Union Mining Co. v. Daughberg*, 2 Sawyer, 450.

continuous adverse possession of the same, or any part thereof, he would lose his right to the same, or that part which was held and enjoyed by the adverse claimant.<sup>1</sup> However, the party claiming the right to the use of water, by adverse possession for the statutory period, must plead the same as a special defense in his answer; and if he should fail to set forth such defense specifically, he would lose the right to introduce evidence in support of it, or to have it considered by the court, in the instructions to the jury.<sup>2</sup>

§ 439. **Claims on U. S. land regulated by statute.**—Proceedings for the enforcement and adjustment of adverse claims upon the public mining land are regulated by United States statute, and an adverse claimant, in order to avail himself of the benefits of the statute, must comply with its provisions and follow the mode prescribed for the adjustment of such claims.<sup>3</sup> The statute provides that the adverse claim must be filed during the period of publication of the notice, on the oath or affidavit of the adverse claimant, and that it must show the natural boundaries and extent of the adverse claim.<sup>4</sup> The adverse

<sup>1</sup> *Davis v. Gale*, 82 Cal. 26.

<sup>2</sup> *American Co. v. Bradford*, 27 Cal. 360. "Where the answer sets up more than five years' continuous adverse possession in the defendant, if the plaintiff, before resting, introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession had not been continued, or uninterrupted, or adverse, but he cannot claim the right to introduce evidence to prove the same facts that were proved in his opening." *Yankee Jim's*, U. S. Co. v. Crary, 25 Cal. 504.

<sup>3</sup> *Mining Co. v. Bullion M. Co.*, 8 Sawyer, 634; 9 Nev. 240.

<sup>4</sup> 420 *Mining Co. v. Bullion Co.*, 1 M. M. R. 114. No one can sue on an adverse claim, until claim is filed in U. S. Land Office. R. S. U. S., Sec. 2326; *Mont Blanc Gravel Co. v. Debour*, 61 Cal. 364; *Rose v. Richmond Min Co.*, 17 Nev. 25. The action, under the U. S. statute to determine who is entitled to the patent for the given claim, is purely a statu-

claimant is also required to commence proceedings to determine the right of possession to the land claimed within thirty days after filing his claim, and to prosecute the same

tory proceeding. *Jackson v. Roby*, 109 U. S. 440; *Gwillin v. Donnellan*, 115 U. S. 45; *Wolverton v. Nichols*, 119 U. S. 485; *Smith v. Newell*, 86 Fed. Rep. 56; *Jordan v. Duke (Ariz.)*, 58 Pac. Rep. 197; *Rough v. Simmons*, 65 Cal. 227; *Seymore v. Fisher*, 16 Colo. 188; *Steele v. G. L. Min. Co.*, 18 Nev. 80; *McCarthy v. Speed*, 11 S. Dak. 363; *Silver City G. M. Co. v. Lowry*, 19 Utah, 384; 20 Am. & Eng. Enc. Law (2 Ed.), 758. In some States ejectment has been held a proper action. *Becker v. Pugh*, 9 Colo. 589; *Marshall S. M. Co. v. Kirtley*, 12 Colo. 410; *Darger v. Le-Seuer*, 8 Utah, 160; *Burke v. McDonald*, 2 Idaho, 810; *Gwillin v. Donnellan*, 115 U. S. 45; 20 Am. & Eng. Enc. Law, *supra*. And in others, a suit to quiet title is held proper. *Perigo v. Dodge*, 168 U. S. 160; *Altoona Min. Co. v. Integral Min. Co.*, 114 Cal. 100; *Mattingly v. Lewisohn*, 18 Mont. 508; *Hulst v. Doerstler*, 11 S. Dak. 14; 20 Am. & Eng. Enc. Law, *supra*. " § 2826. Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description



with reasonable diligence to a final judgment.<sup>1</sup> What would constitute reasonable diligence in each individual case, would, of course, depend upon the facts and circumstances of the case to be considered, and should necessarily be decided by the court. But, according to the provision of the statute, if the claimant fails to commence his action in a court of competent jurisdiction within thirty days after having filed his claim, the question of reasonableness would not enter into a determination of the case, for such failure would amount to a waiver of the adverse claim, and an answer setting up that the claim was not filed within the proper time, or that proceedings were not instituted, would be a complete defense.<sup>2</sup>

by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever." (Act of Congress May 10, 1872, Ch. 152, § 7.) "§ 2351. In case of conflicting claims upon coal lands, where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also when improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections." (Act of Congress March 3, 1872, Ch. 279, § 5.)

<sup>1</sup> Wade's Am. M. Laws, p. 186. Possession determines rights, irrespective of government title. R. S. U. S., Sec. 910.

<sup>2</sup> *Deno v. Griffin*, 20 Nev. 249; *Marshall Silver Company v. Kirtley*, 12 Colo. 410; *Denver Legal News*, 186; 21 Pac. Rep. 492. Tunnel claimant acquires no right to blind lodes as against surface lode claimant, under Sec. 2328, R. S. U. S. *Calhoun G. M. Co. v. Ajax Min. Co.*, 27 Colo. 1; 50 L. R. A. 209. Where a tunnel claimant found the vein of a mining claimant, in his tunnel, within 1500 feet of the mining claimant's point

§ 440. Same—Jurisdiction in cases of adverse claims.

The only provision of the statute in regard to what courts will have jurisdiction in questions between adverse claimants, is the requirement that such proceedings shall be commenced "in a court of competent jurisdiction to determine the question of the right of possession."<sup>1</sup> In accordance with this provision any court which could enter into the determination of the question of the right of possession, would seem to be a court of competent jurisdiction to determine the rights of the conflicting claimants, unless the construction of the laws of Congress applicable to the matter in dispute would prevent the courts having original jurisdiction,<sup>2</sup> for while the State courts would have original jurisdiction in cases where the main question to be determined is whether or not there has been a compliance with the local laws;<sup>3</sup> where the subject-matter of the action arises under laws of the United States, since such action can only be determined by reference to the mining laws of Congress, it has been held the United States courts would have original jurisdiction.<sup>4</sup> The claimant is the only per-

of discovery, the tunnel claimant's location was held to prevail, although no "adverse claim" had been filed. *Enterprise Co. v. Rico-Aspen Co.*, 167 U. S. 108; *Campbell v. Ellet*, 167 U. S. 116. "The prior discovery which excludes the rights of the tunnel owners has reference to *lodes* and not to claims; so that the first clause, or half of the section would seem to give them the right to locate, possess, and enjoy any newly discovered blind leads, even on claims already located." *Wade*, p. 67.

<sup>1</sup> U. S. R. S., § 2325. *Brandt v. Wheaton*, 1 M. M. R. 145.

<sup>2</sup> The jurisdiction of the State courts is not increased by acts of Congress. *420 Mining Company v. Bullion Co.*, 1 M. M. R. 114. Alienage cannot be set up in a collateral proceeding, but only by the government. *Tornanses v. Melsing*, 109 Fed. Rep. 710.

<sup>3</sup> *Wade Am. Min. Law*, p. 106; *Trafton v. Noyes*, 4 *Sawyer*, 178.

<sup>4</sup> *Frank & Co. v. Lorimer*, 1 Colo. Law Rep. 495. And such action in a State court would accordingly be removable to U. S. court. *Idem*. 1 M. M. R. 150.

son authorized by the statute to file an adverse claim, but the construction given this provision of the statute does not prevent such claim being filed by an agent of the claimant, for in case the adverse claimant were a corporation, the necessity of such a construction is quite obvious.<sup>1</sup>

§ 441. *Same—All conflicts not adverse claims.*—It has been held that in order to constitute an adverse claim the clash of interests must be real and substantial. A conflict must exist as a reality before a controversy will be considered an adverse claim, and a mere hypothetical conflict, although it is just and proper that it should be adjusted, by the court, will not operate to stay proceedings for the disposal of public land.<sup>2</sup> For instance, it is not necessary that the patentee of a claim should file an adverse claim to an application for patent for a cross lode, or other conflicting claim, as the ground patented would be excepted from the subsequent patent.<sup>3</sup> An adjoining property owner could not maintain an adverse claim against the

<sup>1</sup> *Van Dusen v. Star Iron Min. Co.*, 36 Cal. 571. The recent decisions of the U. S. Supreme Court are all to the effect that unless some Federal question is involved, the mere fact of a contest of a mining claim, does not give the Federal courts jurisdiction. *Blackburn v. Portland Co.*, 175 U. S. 571; *Shoshone Co. v. Rutter*, 177 U. S. 505; *Colo. Co. v. Turck*, 150 U. S. 138; *Bushnell v. Crooke Min. Co.*, 148 U. S. 682; *Wise v. Nixon*, 76 Fed. Rep. 3; 20 Am. & Eng. Enc. Law (2 Ed.), 759. "Where, on mandamus to compel the commissioners of the land office to issue relator a patent to mineral land, the question is whether the land is mineral, under the statutes, so as to be open to the application, a subsequent adverse claimant is not a necessary party (Rev. St., Art. 3498k), providing for the contest of adverse claims in another manner." *Colquitt-Tignor Min. Co. v. Regan* (Texas, 1902), 68 S. W. 154.

<sup>2</sup> *Wade's Amer. Min. Law*, pp. 186 and 187.

<sup>3</sup> *Iron Silver Mining Co. v. Campbell*, 135 U. S. 286; 16 M. M. R. 218; *Iron Silver Min. Co. v. Mike Co.*, 143 U. S. 394; *Same v. Sullivan*, 143 U. S. 481. Mill claimant rights are subordinate to mineral claimant. *Cleary v. Skiffich* (Colo.), 65 Pac. Rep. 59.

owner of a lode claim who had followed the dip of his vein under the land of such adjoining property owner,<sup>1</sup> nor would the right or title to an easement support an adverse claim, so as to bring about a stay of proceedings for the procurement.<sup>2</sup> In short, before a controversy can take the form of an adverse claim, there must be a real and substantial conflict of interests.<sup>3</sup>

§ 442. Same — When and where claim must be filed. — Adverse claims, or actions to determine the right of possession to mines, or mining land, must be instituted at the proper United States land office, within the sixty days period of newspaper publication, and the notice of adverse claim must be duly sworn to by the person making the same, before some competent officer of the district, or the register or receiver of the office where the claim is filed.<sup>4</sup> It

<sup>1</sup> Wade's Amer. Min. Laws, p. 187; *Maxey v. Wilkinson*, 12 M. M. R. 602.

<sup>2</sup> *Rockwell v. Graham*, 15 M. M. R. 299, a right of way for a flume for water.

<sup>3</sup> Wade Am. M. Laws, p. 187; Copp's M. L. Min. Decisions, 96; 4 *Landowner*, 8. No one can file an adverse claim, under the statute, who has not an interest in the surface of the land claimed. *Noyes v. Mantle*, 127 U. S. 348; *Del Monte Co. v. Last Chance*, 171 U. S. 55; *Walrath v. Champion Co.*, 171 U. S. 298; *Providence Co. v. Burke* (Ariz.), 57 Pac. Rep. 641; *Quigley v. Gillett*, 101 Cal. 462; *Kannaugh v. Quartette Co.*, 16 Colo. 841; *Cronin v. Bear Cr. Co.* (Idaho), 32 Pac. Rep. 204; *Basin Co. v. White*, 22 Mont. 147; *South End Co. v. Tinney*, 22 Nev. 19; *Mars v. Oro Co.*, 7 S. Dak. 605; *Argentine v. Benedict*, 18 Utah, 183; *Dohahue v. Johnson*, 9 Wash. 187; *Iba v. Central Assn.*, 5 Wyom. 355; 20 *Am. & Eng. Enc. Law*, 760. The holder of an easement need not adverse a mining claim. *Rockwell v. Graham*, 9 Colo. 86. Holder of a previous grant can depend on grant and need not adverse. *Mantle v. Noyes*, 5 Mont. 274; s. c. 127 U. S. 348. Co-owner need not adverse. *Turner v. Sawyer*, 150 U. S. 578; *Brundy v. Mayfield*, 15 Mont. 201.

<sup>4</sup> U. S. Rev. Sta., § 2325; *Hunt v. Eureka Gulch M. Co.* (Colo.), 24 Pac. Rep. 550; *Seymour v. Fischer* (Colo.), 27 Pac. 240; *Kannaugh v. Quartette M. Co.* (Colo.), 27 *Id.* 245.

should be filed with the register or receiver of the same land office where the application for patent was filed, should set forth the nature and extent of the conflict, and if he claims as a purchaser, should produce an abstract of title, or proof of the fact of his purchase,<sup>1</sup> and if he claims as a locator, should file a certified copy of the location from the office of the proper recorder.<sup>2</sup> Where there is a defect in the notice of publication, which would necessitate proceedings to be commenced *de novo*, by the locator of the claim, if an adverse claim was filed during the notice of the first publication, it should be refiled upon the publication of the corrected notice,<sup>3</sup> and if suit had been commenced upon the adverse claim prior to the publication of the corrected notice, it would operate to stay the proceedings subsequent to publication.<sup>4</sup>

§ 443. Same — As between lode and placer claimants. A claimant to a placer mining location is entitled to the possession of a quartz lode within the boundaries of his claim, if the same was not known to exist therein at the time application for a patent to the placer claim was made,<sup>5</sup> and where an application for a patent to a placer claim is made, a subsequent locator of a quartz lode, within the boundaries thereof, must file his adverse claim during the

<sup>1</sup> *Ante, idem.* Barringer & Adams, pp. 383 to 414.

<sup>2</sup> R. S. U. S., *supra*. Barringer & Adams on Mines and Mining, pp. 384 to 390.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> Sickels' Min. Laws, 313; Wade, p. 167.

<sup>5</sup> *Montana Copper Co. v. Dahl*, 6 Mont. 131. "Since the locator of a valid placer mining claim is entitled to the exclusive possession of unknown lodes within its limits at the time of making an application for a patent therefor, a subsequent locator of such unknown lodes is a trespasser, as against the placer claimant, and obtains no right or title to such lodes." *Clipper v. Ell L. & M. Co.* (Colo.), 55 Cent. Law Jour. 210 (April, 1902).

period of publication of the notice of such application, or he will afterward be barred from questioning the validity of such placer location.<sup>1</sup> But where a vein or lode is known to exist within the boundaries of a placer claim, if such claimant applies for a patent and does not include an application for the vein or lode, this would be construed as a conclusive declaration of intention on the part of the claimant that he exercised no right of possession to such vein or lode, and a claim could afterward be located upon such vein or lode, the same as though no prior location of the land had been made.<sup>2</sup> A valid location of a lode claim on the public

<sup>1</sup> *Rounhelm v. Dahl*, 6 Mont. 187; 55 Cent. Law. Jour. 212 (Sept. 1902). "Revised Statute (U. S.), Sec. 2333, provides that where a vein or lode is included within a placer claim, the applicant for a placer patent must state the fact, and make specified payments therefor, but that, if the existence of a vein or lode therein is unknown at the time of the application, the placer claim shall carry all the mineral within its boundaries, but if known to exist at the time of the application and not mentioned in the claim or patent, the application shall be construed as a conclusive declaration that the placer claimant has no right to the possession thereof. This statute has been frequently construed; thus, it has been held that, under the statute, the holder of a placer patent which includes a vein known, but not mentioned in the application or patent, has no title thereto, and cannot disturb the peaceable possession of another, whether under title or as a mere trespasser. *Reynolds v. Silver Mining Co.*, 116 U. S. 687; 6 Sup. Ct. Rep. 601. But in order that lodes may be excepted under this statute from the grant in a placer patent, they must be clearly ascertained and of such value as to justify their exploitation and known to exist at the time of application for patent. Hence in a controversy as to whether a certain lode was included in a placer patent, testimony that at the time of the application for the placer patent the land was thought more valuable for placer mining than for quartz lode mining was held admissible to show that the quartz lode was not such as would be exempt from the grant of the placer patent. *Brownfield v. Bier*, 15 Mont. 403; 39 Pac. Rep. 461; *United States v. Iron Silver Mining Co.*, 128 U. S. 673; *Montana R. R. v. Migeon*, 68 Fed. Rep. 811; *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431; 12 Sup. Ct. Rep. 555.

<sup>2</sup> *United States v. Iron Sil. Min. Co.*, 128 U. S. 673. In a suit to determine adverse claims to mining grounds, defendants held to have the

land is a grant from the government to the locator thereof, and carries with it, by a compliance with the law, the right of obtaining a full and complete title to the land, included within the boundaries of the claim,<sup>1</sup> and after a patent has been issued to the land covered by the claim, in an action at law, the issuance of the patent would be conclusive as to the title of the land within its limits.<sup>2</sup>

§ 444. Same — In case of overlapping claims. — Where two persons take up adjoining claims and the one last taken up overlaps the other, and neither claimant is working that portion of the claim which overlaps the other, but both are working different portions of their respective claims, the fact that the locator of the last claim has been in possession of his claim for the full statutory period would not divest the owner of the first claim of the right to his claim, to the extent of the original boundaries, for the possession of that portion of his claim that overlapped the second location, by the locator of the second claim, would not constitute an adverse possession to that of the locator of the first claim.<sup>3</sup> To constitute an adverse possession

burden of establishing an "actual discovery" prior to the initiation of the plaintiff's location. *Sands v. Cruikshank* (S. Dak.), 87 N. W. Rep. 589. A location of a mining claim, based on a discovery of mineral within the limits of another existing and valid location, is void. *Tuolumne Consol. Min. Co. v. Maier* (Cal.), 66 Pac. Rep. 863.

<sup>1</sup> *Butte City Smoke House Lode Cases*, 6 Mont. 409.

<sup>2</sup> *Talbot v. King*, 6 Mont. 76; *Seymour v. Fisher* (Colo.), 27 Pac. Rep. 240; *Kannaugh v. Quartette M. Co.* (Colo.), 27 Pac. Rep. 245; *Richard v. Wolfing* (Colo.), 32 Pac. Rep. 971.

<sup>3</sup> *Maine Boys T. Co. v. Boston T. Co.*, 37 Cal. 41. For priority of title where veins intersect see R. S. U. S., Sec. 2386. A prior location will prevail over one three days later, although the boundaries were not marked off, as this was not an unreasonable time between the posting of notice and marking the boundaries. *Union Mining &c. Co. v. Leicht*, 24 Wash. 585.

by the occupant of the later location, sufficient to work an extinguishment of the right of the senior locator, there must be, coupled with the non-user on the part of the first locator of that portion of his claim overlapped by the second location, some act, on the part of the locator of the second claim, adverse and hostile to the rights of the first locator and which would prevent his exercise thereof.<sup>1</sup> And where controversies arise as to any portion of the ground included within the junior location, the owner of the first claim could abandon his rights to such portion of his claim as may be in dispute without forfeiting any rights he may have to the remainder of his claim.<sup>2</sup>

§ 444a. Same — Appeals — Land officers' duties. — It is the duty of the register or receiver of the land office where an adverse claim is filed to "notify the parties interested in the contest that such adverse claim has been filed." The date of filing the adverse claim should be indorsed upon the same, and a correct record should be preserved of all notifications issued on the claim.<sup>3</sup> After the filing of the claim, all proceedings on the application for a patent should be suspended, except the preliminary matters accompanying the publication and posting of notices, until the adjudication of the controversy in a

<sup>1</sup> Marvin v. Brewster Iron Co., 55 N. Y. 538.

<sup>2</sup> Tyler Min. Co. v. Last Chance Min. Co. (C. C. App. 9 Ct.), 7 U. S. App. 463; 54 Fed. Rep. 284. But the prior of two mining locations must prevail where they overlap each other lengthwise on the course of the lode, as where side locations interfere with following down the lode. *Ante, idem.* "Where apex of vein passes through one end line and parallel side line, the extra lateral rights of locator are bounded by the vertical plane of such end line and a parallel plane, downward through the point where the apex crosses the side line." Parrot S. & C. Co. v. Heinz (Mont.), 64 Pac. Rep. 326; 53 L. R. A. 491.

<sup>3</sup> Wade's Am. Min. Laws, pp. 188 and 189; Copp's U. S. Mineral Lands, pp. 204-277.



court of competent jurisdiction, or until the adverse claim has been waived or withdrawn.<sup>1</sup> As the proceedings in cases of adverse claims are clearly defined by the act itself, we deem it unnecessary to enlarge upon the different stages of proceedings prior to the rendition of judgment. After the judgment is rendered a period of sixty days is allowed for filing the notice of appeal after notice of the decision has been served, and if the notice of appeal is not served within that time, the case will be closed and the decision of the commissioner will be final.<sup>2</sup> Thirty days is allowed the appellant for filing points of exception and argument, after service of the notice of appeal, and local land officers have no power to grant further time for perfecting the appeal, as this authority can be exercised by the commissioner alone.<sup>3</sup>

<sup>1</sup> The notice required is, in effect, a summons. *Wolfley v. Lebanon Co.*, 18 M. M. R. 272.

<sup>2</sup> *Wade's Amer. Min. Law*, pp. 188, 189.

<sup>3</sup> 6 *Landowner*, 124; *Wade*, pp. 188 and 189. In an adverse suit, the court may restore the rightful party to possession. *Silver City G. & S. Co. v. Lowery*, 19 *Utah*, 384; 57 *Pac. Rep.* 11. A jury trial is not essential in an adverse claim under R. S. U. S., Sec. 2326; *Perigo v. Dodge*, 163 *U. S.* 160.

## **PART II.**

**ACTIONS FOR INJURIES TO MINING RIGHTS  
AND PERSONS.**



## CHAPTER I.

### ACTIONS FOR PERSONAL INJURIES.

- SECTION 445.** What personal injuries are actionable.  
446. Same — Natural and artificial agencies.  
447. Who can maintain action.  
448. Injury to employee — Unsafe place.  
449. Knowledge of defect bars recovery.  
450. Same — Injuries from falling bodies.  
451. Same — Dangerous roof from negligence.  
452. Assumed risks — What are — Accidents.  
453. Same — Negligence of fellow-servant, no liability.  
454. Who are fellow-servants.  
455. Same — Negligence of holsterman.  
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457. Injuries from unsafe machinery and appliances.  
458. Failure to inspect.  
459. Clothing catching on machinery.  
460. Giant powder — Injuries from explosions.  
461. Injury from steam explosion.  
462. Bad air or gas.  
463. Failure to furnish props.  
464. Defective scaffolds and platforms.  
465. Injury on ladder.

§ 445. What personal injuries are actionable. — Actions can generally be maintained for those personal injuries which are due to the negligence of another. Actionable negligence is not an absolute or intrinsic term, but is always relative to the circumstances of time, place or person, and is defined as an omission to do that which a reasonable man would do, or doing something which a reasonable man would not do.<sup>1</sup> It will be seen, therefore,

<sup>1</sup> Negligence was recently defined as "the failure to observe, for the protection of another's interest, and safety, such care, prudence and vigilance, as the circumstances justly demand and the want of which causes the injury." *Downey v. Gemini Mining Co.* (Utah, 1902), 68 Pac. Rep. 414; *Richardson v. Kier*, 4 M. M. R. 618.

that the act may be either one of omission or commission, and if there is also a correlative duty owed to the injured party, the injury and negligent act combining would furnish him a cause of action.<sup>1</sup>

§ 446. **Same—Natural and artificial agencies.**—There is, generally, no responsibility for injuries, resulting from accidents due to natural causes, in themselves beyond the control of man, and though a mine owner's acts may have conduced to produce the injury, if his acts have been without default or negligence, no recovery could be had,<sup>2</sup> but where the injury results from natural causes, aided by human agency, to the extent that the injury would not have resulted from natural causes alone, negligence might, in such case, be imputed to the author of such injury and a recovery therefor be allowed.<sup>3</sup>

§ 447. **Who can maintain action.**—Generally any one to whom there is a duty owing can maintain an action for injury sustained against the party whose negligence caused the injury, and there is no difference in degree between the liability for one's own negligence or want of skill, whether it is a stranger or an employee who is injured;<sup>4</sup> but without a corresponding duty owing to the party injured there could be no recovery<sup>5</sup> and for this reason a mere

<sup>1</sup> *Armour v. Golkewska*, 95 Ill. App. 492.

<sup>2</sup> *Fletcher v. Smith*, 5 M. M. R. 78; *Reiter v. Winona Co.*, 75 N. W. Rep. 219; *Olsen v. McMullen*, 24 N. W. 818.

<sup>3</sup> *Robinson v. Black Diamond Co.*, 14 M. M. R. 93.

<sup>4</sup> *Ardesco Oil Co. v. Gilson*, 10 M. M. R. 669.

<sup>5</sup> *Buswell Per. Inj.* 87-91. "If an independent contractor, going upon the premises of another to perform work under a contract with the owner, is injured from defects known, or which by fair care ought to be known to the owner, and unknown, or which by fair care cannot be known to the contractor, the owner is liable; but, under the reverse of these circumstances, he is not liable." *Sesler v. Rolfe Coal & Coke Co.*, 41 S. E. Rep. 216 (W. Va. 1902).

trespasser<sup>1</sup> or licensee<sup>2</sup> could not maintain the action. The duty may either be one owing by virtue of the relation of the parties which the law recognizes, as arising therefrom, or one created by statute, such as actions for injuries resulting in death of employees, from the employer's negligence.<sup>3</sup>

§ 448. **Injury to employee — Unsafe place.** — On account of the hazardous nature of mining operations the duty of the employer to furnish a reasonably safe place for the employee to work, is particularly applicable to mines, and the employer is liable to his employee for an injury resulting from the dangerous nature of the place, if he has failed to take proper and reasonable precaution to provide for the safety of the place where the injury occurred;<sup>4</sup>

<sup>1</sup> *Tully v. Phil. &c. Co.*, 5 Del. Sup. A. 95. One operating a cable to haul coal cars from his mine held not liable for injuries to trespassing child. *Uthermohlen v. Bogg's Run Min. & Mfg. Co.* (W. Va.), 40 S. E. Rep. 410.

<sup>2</sup> *Buswell Per. Inj.* 87, 91. No duty is placed by the law upon a master to furnish a servant a guard to protect him from a body of strikers. *Lewis v. Taylor Coal Co.* (Ky. 1901), 66 S. W. Rep. 1044.

<sup>3</sup> The failure to perform a statutory duty does not, usually, prevent the defense of contributory negligence. *Queen v. Coal Co.*, 95 Tenn. 465; *Krause v. Morgan*, 58 Ohio St. 26; *Christner v. Coal Co.*, 146 Pa. St. 67. But see *Odin Coal Co. v. Denman*, 185 Ill. 418; *s. c.* 84 Ill. App. 190.

<sup>4</sup> *Lake Superior Co. v. Erickson*, 10 M. M. R. 39; *MacSwinney Mines, etc.*, p. 611; *Hamman v. Coal Co.*, 156 Mo. 234; *Smith v. Coal Co.*, 75 Mo. App. 177; *Wright v. Compton*, 2 M. M. R. 189; *Buswell Per. Inj.* 202. Servant entitled to rely on presumption that master has made place reasonably safe, in absence of notice that it is not safe. *Himrod Coal Co. v. Clark*, 99 Ill. App. 832; 197 Ill. 514. The rule of safe place does not apply where the employee is employed to do work specially hazardous, as to repair known defects. *Wahlquist v. Maple Grove Coal and Mining Co.* (Iowa, 1902), 89 N. W. Rep. 98. But this rule does not preclude recovery by employee, helping to repair roof, where superintendent had failed to provide temporary props. *Idem.*

and the duty to furnish a safe place to work cannot be delegated by the employer to an agent or servant, so as to excuse him from responsibility to one injured, as a result of working in an unsafe place.<sup>1</sup>

§ 449. Same—Knowledge of defect bars recovery.— But the rule which holds the master liable for injuries from permitting a servant to work in an unsafe place is not without some limitation, necessary to prevent an abuse of the doctrine from too broad an assertion of the rule. If

<sup>1</sup> *Trihay v. Brooklyn Co.*, 15 M. M. R. 535. Duty to properly timber cannot be so delegated as to avoid liability from unsafe roof, from want of timbers. *Con. Coal Co. v. Lundak*, 196 Ill. 594; 63 N. E. Rep. 1079. Mine owner must keep reasonably safe entries for means of ingress and egress and mine employee has right to presume it is so kept. *Wellston Coal Co. v. Smith* (Ohio), 10 Amer. Neg. Rep. 445; decided June, 1901. Liability was predicated upon failure to provide safe place to work, in the following cases: *Mellors v. Shaw*, 1 B. & S. 437; 9 W. R. 748; *Carter v. Clark*, 78 L. Y. N. S. 76; *Bethlehem Iron Co. v. Weiss*, 100 Fed. Rep. 45; *Mullin v. Cal. Mining Co.*, 105 Cal. 77; *Gibson & Co. Min. Co. v. Sharp*, 5 Colo. App. 321; *Steele Co. v. Shields*, 146 Ill. 603; *Graham v. Newburg Coal Co.*, 38 W. Va. 273; *Trihay v. Brooklyn Lead Co.*, 4 Utah, 468; *Iron Co. v. Elkins*, 90 Va. 249; *Iron Co. v. Pace*, 101 Tenn. 476; *Vanesse v. Coal Co.*, 159 Pa. St. 403; *Schlacker v. Ashland Iron Co.*, 89 Mich. 253; *Hamman v. Coal & Coke Co.*, 156 Mo. 232; *Fisher v. Lead Co.*, 156 Mo. 479; *Carlson v. Coal Co.*, 9 Wash. 395; *Kelly v. Min. Co.*, 16 Mont. 484; *Lexington Min. Co. v. Stephens* (Ky.), 47 S. W. 321; *Blondin v. Quarr. Co.* (Ind. App.), 39 N. E. 200; 20 Am. & Eng. Enc. Law, 56. See also *Knoxville Iron Co. v. Harbison*, 133 U. S. 13; *Holden v. Hardy*, 169 U. S. 366. And where negligence consists in violation of statute, for safety of employees see, *Myers v. Hudson Iron Co.*, 150 Mass. 125; *Com. v. Elk Hill Coal Co.*, 4 L. L. N. (Penn.), 80; *Sangamon Coal Co. v. Wiggerhous*, 122 Ill. 279; *Odin Coal Co. v. Dedman*, 185 Ill. 413; s. c. 84 App. 190; 20 Am. & Eng. Enc. Law (2 Ed.) 59; *Durant v. Coal Co.*, 97 Mo. 62. Nor would the plaintiff's knowledge defeat recovery. *Idem.* But employer must know that statute is violated. *Leslie v. Coal Co.*, 110 Mo. 31. See, however, as to necessity of employer's knowledge, *Herbert v. Mound City & Co.*, an able opinion, by Goode, J., 90 Mo. App. 305. And see, also, *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; 63 N. E. 649.

the servant knows of any defects in the condition of his place of work,<sup>1</sup> or if he has equal or superior information in regard thereto than his master,<sup>2</sup> and continues his work, without objection, until his injury, he cannot recover, for to hold the master liable in such cases would be to make him an insurer of his servants, for injuries resulting from their own folly.

§ 450. **Same — Injuries from falling bodies.** — As a general rule those engaged in making excavations, where the dangerous nature of the work is open to common observation, assume the risk of injuries from falling earth and rock, caused by the excavations.<sup>3</sup> To hold the master

<sup>1</sup> *Watson v. Coal Co.*, 52 Mo. App. 366; *Berning v. Medart*, 56 Mo. App. 443; *Pioneer Min. Co. v. Thomas*, 32 So. Rep. 15.

<sup>2</sup> *McArthur v. Nordstrom*, 87 Ill. App. 554; *Lawless v. Laclede Co.*, 72 Mo. App. 679; *Money v. Lower Vein Co.*, 10 M. M. R. 56; *Island Co. v. Greenwood (Ind.)*, 4 Amer. Neg. Rep. 146. Whether a boy of fourteen has such intelligence as to be guilty of contributory negligence in taking a place of danger in driving a mule in coal mine, is for the jury to determine. *Boyer v. Northern Pac. Coal Co. (Wash. 1902)*, 68 Pac. Rep. 348. Notice that roof was not propped a few hours before injury does not bar recovery. *Cushman v. Carbondale Fuel Co.*, 88 N. W. 817. Not only knowledge of the defect but also the danger resulting therefrom is usually necessary to prevent recovery. *Hamilton v. Coal Co.*, 108 Mo. 364; *Conroy v. Vulcan Iron Works*, 62 Mo. 85; *Hamman v. Coal Co.*, 156 Mo. 232; *Fox v. White Lead Works*, 84 Mich. 676; *Graham v. Coal Co.*, 38 W. Va. 273; 20 Am. & Eng. Enc. Law (2 Ed.), 123.

<sup>3</sup> As cave-in of gravel pit. *Allen v. Logan*, 37 Pac. Rep. 496; *Naylor v. C. & N. W. Co.*, 27 N. W. 24; *Buswell Per. Inj.*, Sec. 205, p. 343. Or falling rock in quarry. *Mielk v. C. & N. W. Co.*, 79 N. W. 22. Cave-in of ditch. *Brown v. Chat. Co.*, 47 S. W. 415; *Vincennes Co. v. White*, 24 N. E. 745; *Swanson v. Lafayette*, 33 N. E. 1033. Of falling earth or clay. *Griffin v. Ohio & C. Co.*, 24 N. E. 888; *Pederson v. Rushford*, 42 N. W. 1063; *Olsen v. McMullen*, 24 N. W. 318; *Rasmussen's Admr. v. R. R. Co.*, 21 N. W. 583; see *Rieter v. Winona & C. Co. (Minn.)*, 75 N. W. 219, where it is said: "Under the rule, recently stated in *Swanson v. Railway Co. (Minn.)*, 70 N. W. 978, that servants, while performing their duties, are bound to take notice of the operation of



liable in such a case would be to make him an insurer, not only of the place, but also of the work of his employee, as the place itself is continuously changed by the prosecution of the work.<sup>1</sup> The law presumes not only that its own shifting doctrines are known to every man, but that every one is familiar with the immutable laws of nature and this being true, an injury from coming in contact with a body subject to the force of gravitation is a risk incident to one's service, for which no recovery can be had.<sup>2</sup>

familiar natural laws, and to govern themselves accordingly, it is held that the complaint herein failed to state a cause of action." For additional cases of injuries from falling earth and scales, see: *Con. Coal Co. v. Schreiber*, 167 Ill. 539, s. c. 65 Ill. App. 304; *Con. Coal Co. v. Bokamp*, 181 Ill. 9; s. c. 75 App. 605; *Mellors v. Shaw*, 30 L. J. Q. B. 333; *West Coal Co. v. Ingraham*, 70 Fed. Rep. 219; *Taylor v. Star Coal Co.*, 110 Iowa, 40; *Dewesse v. Meramec Iron Co.*, 128 Mo. 423; s. c. 54 App. 476; 20 Am. & Eng. Enc. Law. (2 Ed.), p. 58. For other cases holding no liability where nature of work continuously changes the place, see: *Porter v. Silver Cr. Co.*, 84 Wis. 424; *Durst v. Steele Co.*, 173 Pa. St. 165; *Diamond State Iron Co. v. Giles*, 7 Houst. (Del.) 556; *Bradley v. Chicago &c. Co.*, 138 Mo. 293; *Kennedy v. Grace &c. Co.* 93 Fed. Rep. 116; *Finalson v. Utica Min. Co.*, 67 Fed. Rep. 507; 20 Am. & Eng. Enc. Law. (2 Ed.), 57. Where the evidence as to negligence is conflicting, it is error to instruct that the mine owner is liable for the act of agent in charge, from injury due to falling slate. *Carson v. Coal Co. (Iowa)*, 1 Am. Neg. Rep. 230; *Ewell v. Mining Co. (Utah)*, 9 Am. Neg. Rep. 639. In an injury from falling coal it is error to instruct that the sole question is whether it would have fallen of its own weight, if not braced, as the real issue is whether the defendant, with reasonable care, could have anticipated and avoided the injury. *Freeman v. Coal Co. (Mont.)*, 64 Pac. Rep. 347.

<sup>1</sup> *Aldrich v. Furnace Co.*, 78 Mo. 559; *O'Donnell v. Potter*, 117 Mo. 13, 18; *Olson v. McMullen*, 34 Minn. 94; *Rasmussen v. C., R. I. & P. Co.*, 65 Iowa, 236; *Con. Coal Co. v. Young*, 31 Ill. App. 417; *Beach Con. Neg. (2 Ed.)*, Sec. 360, p. 464; *Minneapolis v. Lunkin*, 58 Fed. Rep. 525; *Finalson v. Utica M. & M. Co.*, 67 Fed. Rep. 507; *Curley v. Hoff*, 5 Am. Neg. Rep. 668; *Syndicate v. Murphy (Ky.)*, 60 S. W. 182; *Quinn v. Baird*, 7 Am. Neg. Rep. 712; *West Stove Co. v. Mustad*, 85 Ill. App. 82. But see *Bradley v. R. R.*, 138 Mo. 293.

<sup>2</sup> *Ante, idem.* Also *Regen v. Polo*, 5 Am. Neg. Rep. 63; *Golden v. Sidghardt*, 5 Am. Neg. Rep. 78. But see *Larson v. Mining Co.*, 71 Mo. App. 512.

§ 451. Same — Dangerous roof, from negligence. — But while the law furnishes no remedy for injuries from natural forces, or where the servant knows of the danger, or by the exercise of reasonable care could have known and avoided the same,<sup>1</sup> this rule does not exempt the master from liability for injuries which, by reasonable care and prudence on his part, could have been avoided;<sup>2</sup> and where the master places the duty of keeping the roof or walls of the mine in a safe condition upon a superintendent or vice-principal, who has the miners under his control, since their safety depends entirely upon his vigilance, and the proper discharge of his duty and in the discharge of same he is the representative

<sup>1</sup> Shear. & Redf. Neg. (5 Ed.), 211, 212; *Doyle v. Trust Co.*, 140 Mo. 1.

<sup>2</sup> *Bunker Hill Mining Co. v. Schnellling*, 1 Amer. Neg. Rep. 782; *Ashland Coal Co. v. Wallace* (Ky.), 4 Amer. Neg. Rep. 88. "Where an employee of a mining company was killed by the falling of rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence, it was held, that notice to the mining superintendent of the dangerous condition of the roof was notice to the company, and if this were long enough before the accident to have given time to repair the same, it was sufficient to fix negligence upon the company." *Quincy Coal Co. v. Hood*, 77 Ill. 69; *M. M. D.* 248. Where foreman knows that roof needed propping, jury will be justified in finding mine operator guilty of negligence. *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258; *Con. Coal Co. v. Lundak*, 196 Ill. 594. Posting a notice that all employees in the employer's mine assume injury from falling scales and roof, does not constitute such a contract between employer and employee as to relieve the former from his duty to furnish a reasonably safe place. *Con. Coal Co. v. Lundak*, 97 Ill. App. 109; 196 Ill. 594. Where mining boss has knowledge of defective roof and fails to repair, an injury to an employee therefrom, will generally render employer liable. *Mining Co. v. Schnellling* (U. S. C. C.), 1 Amer. Neg. Rep. 782. And where foreman has knowledge of defective roof and miner is without knowledge, a resulting injury can be predicated upon this neglect of the master. *Harder & Co. Coal Co. v. Schmidt* (U. S. C. C. App.), 9 Amer. Neg. Rep. 227. An injury from a roof, made defective by blasting, where mine boss has knowledge, or by reasonable care, could have known of defect, renders master liable. *Wellston Coal Co. v. Smith* (Ohio), 10 Amer. Neg. Rep. 445.

of the master, he will be held liable for any injury from the defective condition of the roof, or walls, resulting from the negligence of himself or his representative.<sup>1</sup> And mere knowledge by the employee that the roof is unsafe, to the extent that risk is incurred in working under it, if the danger is not such as to threaten immediate injury, but it is reasonable to suppose it safe to continue the work, with proper care, will not, as a matter of law, defeat the action.<sup>2</sup> However, if the injury occur at a place where it was the duty of the injured party, or his fellow-servants, to keep the roof safe, no action will lie, for the injury is an assumed risk;<sup>3</sup> and the rule is the same if the duty and breach was that of a "pit boss," who, in law, would be considered a fellow-servant.<sup>4</sup>

<sup>1</sup> *Wellston Coal Co. v. Smith* (Ohio), 10 Am. Neg. Rep. 445; *Fisher v. Cent. Lead Co.*, 156 Mo. 479.

<sup>2</sup> *Hamman v. Cent. Coal Co.*, 156 Mo. 234; *Smith v. Coal Co.*, 75 Mo. App. 177; *Hamilton v. Min. Co.*, 108 Mo. 364, a flexible doctrine.

<sup>3</sup> *Mining Co. v. Clay*, 51 Ohio St. 542; 38 N. E. 610. For a well considered case, where there was shown to be no necessity for inspection or props for roof, and an injury, resulting in death, from falling rock from roof, was held not actionable, see Judge Bland's opinion in *Beomer v. Lead Co.*, 69 Mo. App. 601.

<sup>4</sup> *Tranghear v. Coal Co.*, 62 Iowa, 576; 17 N. W. 775; *Whalen v. Alaska-Treadwell Gold Min. Co.*, 168 U. S. 85; *Delaware Co. v. Carroll*, 10 M. M. R. 47; *Lehigh Valley Co. v. Jones*, 10 *Id.* 30. "The plaintiff, a workman in the coal mine of the defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations: *Held*, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow-laborer." *Hall v. Johnson*, 34 L. J. Ex. 222; 3 H. & C. 539; *Mor. Min. Dig.* 248.

§ 452. **Assumed risks — What are — Accidents.** — The ordinary risks assumed by the servant, upon entering the employment, are all such as, arising out of the nature of the work, would have happened notwithstanding the exercise of proper care.<sup>1</sup> An accident, which an experienced man in that branch of the business could not have foreseen or guarded against, is a hazard incident to the business, which every man engaged in it assumes.<sup>2</sup>

<sup>1</sup> Any injury from an open, obvious danger, which could have been observed, is an assumed risk, from which no recovery can be had. *Lanyon Zinc Co. v. Bell* (Kan. 1902), 68 Pac. Rep. 609. Where miner uses cage instead of ladder, in violation of rule, company not liable. *Anderson v. Mikado Min. Co.* (1902), 8 Ont. Law Rep. 581; *Kielly v. Belcher Co.*, 10 M. M. R. 3; *Strahlendorf v. Rosenthal*, 10 M. M. R. 676.

<sup>2</sup> *Beasley v. Transfer Co.*, 148 Mo. 413; *Corcoran v. Sess.* 168 N. Y. 372; *Buswell Per Inj.* 111 and note. For miscellaneous cases, where miner was held to assume the risk, see *Ala. Min. Co. v. Marcus*, 115 Ala. 389; *Dougherty v. Iron Co.*, 88 Wis. 343; *Beeson v. Min. Co.*, 57 Cal. 20; *Mud. Val. Min. Co. v. Parish*, 74 Ill. App. 559; *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Coal Cr. Min. Co. v. Davis*, 90 Tenn. 711; *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 437; *Moore Lime Co. v. Richardson*, 95 Va. 326; *Bertha Zinc Co. v. Martin*, 98 Va. 791; 20 Am. & Eng. Enc. Law (2 Ed.), pp. 110 and 111. Servant who selects the more dangerous of the two ways to perform his service cannot recover. *Acme Coal Min. Co. v. McIlver*, 5 Colo. App. 267; *Moore v. K. C. F. S. & M. Co.*, 146 Mo. 572. "In an action to recover damages for injuries sustained by plaintiff, while in defendant's employ, caused by blasting in defendant's quarry, there was evidence that plaintiff attempted to clean out a blasting hole with an iron scraper, and, being unable to do so, inserted a steel tamping bar, which struck a concealed and unexploded charge of dynamite, which exploded, causing the injury complained of; that defendant had worked the quarry for twenty-five years; that one of its positive requirements of its quarrymen was that no unexploded charge of any kind be left in the rock; that the hole in question had been charged and blown out three times before the accident happened, the last time being two weeks previous, the charge being entirely exploded or blown out; that when a hole was charged for blasting it was filled to the top, or nearly so, with sand or some other substance placed on top of the charge. *Held*, that, as a matter of law, defendant was not guilty of negligence. *Lanza v. LeGrande Quarry Company* (Supreme Court, Iowa, January, 1902), 11 Amer. Neg. Rep. 209.

§ 453. Same. — Negligence of fellow-servant — ~~No~~ Liability. — Among the ordinary risks included as arising from the nature of the work are those also arising from the negligence of competent fellow-servants, engaged in the same common undertaking as the injured person, and for such injury there is no liability on the part of the master.<sup>1</sup> But where the negligence is that of a partner, even though he may be acting as a fellow-servant, if his duties are within the express or implied scope of the firm business, all of the partners would be liable.<sup>2</sup> Nor is the master relieved from liability for the negligent act of a known incompetent servant,<sup>3</sup> for he is under the legal duty to furnish reasonably competent workmen, as well as to furnish a reasonably safe place and safe machinery and appliances, and for a failure to do so is chargeable with actionable negligence.<sup>4</sup>

<sup>1</sup> *Kielly v. Belcher Co.*, 10 M. M. R. 11; *Ardesco Co. v. Gilson*, 10 M. M. R. 669; *Bryden v. Stewart*, 3 Macq. 80; *Griffiths v. Gidlow*, 3 H. & N. 648; *Senior v. Ward*, 1 E. & E. 385; *Ashworth v. Stanwix*, 3 E. & E. 701; *Mellors v. Shaw*, 1 B. & S. 437; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Rourke v. White & Co.*, 1 C. P. D. 556. Rule changed in England by Employers Liability Act. (43 & 44 Vict., C. 42).

<sup>2</sup> *Ashworth v. Stanwix*, *supra*; *Mellors v. Shaw*, 1 B. & S. 437; *Id.* 9 M. M. R. 678.

<sup>3</sup> The master's knowledge and the competency of an engineer, a question of fact for the jury. *Jack v. Donkwordt*, 10 M. M. R. 690; *McLean v. Bluepoint Co.*, 10 M. M. R. 22.

<sup>4</sup> Where there is evidence that a servant was incompetent, case should go to jury. *Handley v. Daly Mining Co. (Utah)*, 3 Amer. Neg. Rep. 295. "Where several persons are employed in a mine, some breaking down the ore with picks and by blasting, and others at the same time loading and wheeling out the ore so broken down, those engaged in breaking the ore and those engaged in loading and wheeling it out, are fellow-servants in the same line of employment within the rule that they take the risks arising out of the negligence of their co-employees" *Kielly v. Belcher S. M. Co.*, 3 Sawyer, 500; see *s. c.*, p. 437; M. M. D. 244. Under statute requiring examination of mine before each shift of men go on, the superintendent cannot delegate the

§ 454. **Who are fellow-servants** — The United States Supreme Court has recently held that all are fellow-servants in a mine, who are engaged to effect the same common object, regardless of the superiority or inferiority of the service.<sup>1</sup> Many of the mining States have announced the same general rule.<sup>2</sup> And this is in accordance with the common law rule, as a hoisterman,<sup>3</sup> underlooker,<sup>4</sup> and superintendent,<sup>5</sup> whether appointed by the master,<sup>6</sup> or under the statute,<sup>7</sup> are all held to be fellow-servants at common law.<sup>8</sup> But some of the mining States

duty of making the inspection to a foreman. *Kless v. Youghiegheny Mining Co.*, 18 Pa. Sup. Ct. 551. Those whose duty it is to keep safe roof are not fellow-servants with miner. *Cushman v. Fuel Co.*, 88 N. W. 817. A fireman at engine and steam drill helper are not fellow-servants. *Heldmaier v. Cobb*, 96 Ill. App. 315; 62 N. E. Rep. 858.

<sup>1</sup> But see, *contra*, *Alaska United Gold Min. Co. v. Muset* (U. S. C. C. of App., Ninth Circuit), 114 Fed. Rep. 66. A mine superintendent with power to discharge men, was held to be a fellow-servant. *Whalen v. Alaska-Treadwell Gold Min. Co.*, 168 U. S. 85-88.

<sup>2</sup> *Kielly v. Belcher Co.*, 10 M. M. R. 11; *Ardesco Co. v. Gilson*, 10 M. M. R. 669. "It gives no effect to the circumstances that the fellow-servant, through whose negligence the injury came, was the superior of the plaintiff, in the general service in which they were in common engaged. *Michigan v. Blue Point Company* (Cal.), 10 M. M. R. 22. Overseer and workmen fellow-servants. *Lehigh Valley Co. v. Jones*, 10 M. M. R. 30. "Mining-boss" and "driving-boss." *Idem*. And "mining-boss" and miner. *Delaware Co. v. Carroll*, 10 M. M. R. 47; *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255.

<sup>3</sup> *Bartonshill Coal Co. v. Reid*, 3 Macq. 266.

<sup>4</sup> *Hall v. Johnson*, 3 H. & C. 589.

<sup>5</sup> *Willson v. Merry*, L. R. 1 L. C. & D. 326.

<sup>6</sup> *Ante, idem*.

<sup>7</sup> *Howells v. Lindon Co.*, L. R. 10 Q. B. 62.

<sup>8</sup> *Ante, idem*. Parties jointly engaged in drilling holes for blasts are fellow-servants. *Johnson v. Portland Stone Co.* (Oregon, 1902), 67 Pac. Rep. 1018. A mining boss, in Ohio, is held not a fellow-servant, but vice-principal, for whose negligence master is liable. *Wellston Coal Co. v. Smith* (June, 1901), 10 Amer. Neg. Rep. 445. But employees off duty and asleep are not fellow-servants. *Oman v. Salvo*, 117 Fed. Rep. 283.

hold that an overseer,<sup>1</sup> "mining boss,"<sup>2</sup> superintendent,<sup>3</sup> or other superior servant,<sup>4</sup> although engaged in the same common employment, is not a fellow-servant, but a vice-principal, representing the master, for whose negligence he is responsible, and in such States the doctrine of fellow-servant would not relieve the master from liability for their acts.<sup>5</sup>

§ 455. Same — Negligence of hoisterman. — The hoisterman is held to be the fellow-servant with a ground workman and the master is ordinarily not responsible for injuries resulting from his negligence.<sup>6</sup> Accordingly, where a workman was injured by a falling tub, filled with water, the fact that the hoisterman had failed to use the brake, did not render the master liable, but it was held to be the negligence of a fellow-servant.<sup>7</sup>

<sup>1</sup> "A foreman, in charge of hands, is not a fellow, but a superior servant." *Berea Stone Co. v. Craft*, 10 M. M. R. 16.

<sup>2</sup> *Knight v. Sadler Lead and Zinc Co.*, 75 Mo. App. 211; *Lindon C. & M. Co. v. Persons*, 11 Ind. App. 264.

<sup>3</sup> *Collier v. Steinhart*, 10 M. M. R. 1.

<sup>4</sup> *Berea Stone Co. v. Craft*, *supra*.

<sup>5</sup> *Ante, idem*. "Shift boss" not co-employee and master liable. *McMahon v. Ida Min. Co.*, 1 Am. Neg. Rep. 741. In Ohio, one of laborers appointed by mine boss, even held to be vice-principal. *Wellston Coal Co. v. Smith* (1901), 10 Amer. Neg. Rep. 445. Foreman held to be vice-principal, where he had entire charge of operations of mine and hired and discharged men. *Alaska United Coal Min. Co. v. Muset*, 114 Fed. Rep. 66. But see *Whalen v. Gold Min. Co.*, 168 U. S. 85-88.

<sup>6</sup> *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Senior v. Ward*, 1 E. & E. 385.

<sup>7</sup> *Griffiths v. Gidlow*, 10 M. M. R. 639. Miner is not fellow-servant with operator of cage. *Jenkins v. Mammoth Mining Co.* (Utah, 1902), 68 Pac. Rep. 845. Nor with carrier of tools. *Idem*. The question of whether a hoister was started with a sudden jerk, so as to constitute negligence, is one of fact for the jury. *Duffy v. Kivilin* (1902), 98 Ill. App. 483. Where an employee is injured from a premature hoisting and

§ 456. **Same — Department doctrine.** — Some of the States have laid down the rule that before the master is exempt from liability for the negligence of a fellow-servant it must not only be the negligence of a servant in the same grade of employment with the injured one, but that it must also be the negligence of one in the same *department* of the master's service.<sup>1</sup> According to this rule the master would be liable for an injury from the negligence of a fellow-servant although not superior in authority to the injured person, providing the injury resulted from the negligence of a servant in a different, distinct department of the master's business from that of the injured servant.<sup>2</sup> The reason for holding the master liable for the negligence of fellow-servants in distinct departments of the service from the injured one, is said to be based upon the unreasonableness of compelling a servant to assume the risks of injuries from the negligence of servants in distinct departments of the service;<sup>3</sup> but it is doubtful if the distinction was recognized at common law, where the parent doctrine of non-liability for the negligence of fellow-servants had its origin;<sup>4</sup> the distinction has

the ground of negligence alleged is a failure to maintain a safe place to land, no recovery can be had, as the negligence alleged and that proven are different and the cause of the injury is the negligence of a fellow-servant. *Roe et al. v. Thomason* (Tex.), 61 S. W. 528. For case where negligent direction of hoistman caused rock being hoisted to be precipitated against plaintiff and foreman had given the direction to hoist it was held proper to be submitted to the jury. *Sikes v. Granite Co.*, 92 Mo. App. 12.

<sup>1</sup> *Kielly v. Belcher Co.*, 10 M. M. R. 3; *Relyea v. R. R.*, 112 Mo. 86.

<sup>2</sup> *Ante, idem.* *Tabler v. R. R.*, 93 Mo. 79; *Miller v. R. R.*, 109 Mo. 350; *Sullivan v. R. R.*, 97 Mo. 113.

<sup>3</sup> *Kielly v. Belcher Co.*, *supra*; *McMahan v. Ida Mining Co.*, 1 Am. Neg. Rep. 741; *Schlereth v. R. R.*, 115 Mo. 87, where the department doctrine was recognized in Missouri.

<sup>4</sup> "Workmen do not cease to be fellow-workmen because they are not all equal in station or authority." *Wilson v. Merry*, L. R. 1 Sc. & D. 326. "The doctrine of common employment exempted the master from



been practically abolished by the Supreme Court of the United States,<sup>1</sup> and many of the recent decisions of the State courts have favored a complete retraction of the department doctrine.<sup>2</sup>

§ 457. **Injuries from unsafe machinery and appliances.**— Employers owe to their employees the exercise of reasonable care and diligence in providing them with safe machinery and suitable tools and appliances to carry on their work, and for an injury from a failure to discharge this duty the employer is liable,<sup>3</sup> and the master cannot avoid liability by having delegated the duty to an agent or servant.<sup>4</sup> But the use of machinery or appliances that are known by the employee to be defective will bar a recovery, if there has been no promise to repair by the employer;<sup>5</sup> he is not bound to furnish absolutely safe appliances;<sup>6</sup> it

all liability for the negligence of fellow-workmen, unless he was, himself, guilty of *personal negligence*." *Bryden v. Stewart*, 2 Macq. 30; *Griffiths v. Gidlow*, 3 H. & N. 648; *Senior v. Ward*, 1 E. & E. 385; *Ashworth v. Stanwix*, 3 E. & E. 701; *Mellors v. Shaw*, 3 B. & S. 437; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Rourke v. White & Co.*, 1 C. P. D. 556; 2 *Idem*, 205; *Hall v. Johnson*, 3 H. & C. 589; *Grattis v. K. C. P. & G. Co.*, 153 Mo. 380.

<sup>1</sup> *Grattis v. K. C. P. & G.*, 153 Mo., p. 401; *R. R. v. Baugh*, 149 U. S. 369; *R. R. v. Hornby*, 154 U. S. 349; *R. R. v. Keegan*, 160 U. S. 259; *R. R. v. Peterson*, 162 U. S. 346; *Oaks v. Mose*, 165 U. S. 363; *Alaska & Gold Min. Co. v. Whelen*, 168 U. S. 85-88.

<sup>2</sup> See complete list of cases and able refutation of the doctrine, by Marshall, J., in *Grattis v. K. C. P. & G. Co.*, 153 Mo. 380.

<sup>3</sup> *Lake Sup. Co. v. Erickson*, 10 M. M. R. 39; *Ardesco Oil Co. v. Gilson*, 10 M. M. R. 669.

<sup>4</sup> *Trihay v. Brooklyn Co.*, 15 M. M. R. 535; *Magnus v. Bullion Beck Co. (Utah)*, 4 Amer. Neg. Rep. 91.

<sup>5</sup> *Watson v. Coal Co.*, 52 Mo. App. 366; *Berning v. Medart*, 56 Mo. App. 443; *Aldrich v. Furnace Co.*, 78 Mo. 559.

<sup>6</sup> *Lake Sup. Co. v. Erickson*, *supra*. Nor is he liable where machinery is open and visible, such as revolving shaft, as he is not bound to change his plant. *Lemoine v. Aldrich (Mass.)*, 10 Amer. Neg. Rep. 637.

is sufficient if the machinery or appliances, although not the most approved,<sup>1</sup> are the same as those customarily used by prudent persons in the same business;<sup>2</sup> and even though bad material or unskillful work has been used and an injury result therefrom, there is no liability if the master had employed a competent and skilled machinist to do the work, or construct the machinery,<sup>3</sup> for any other rule would make the master an insurer of the safety of his servants.

§ 458. *Failure to inspect.* — It is the duty of the master to inspect dangerous places and appliances, to keep the same in a reasonably safe condition, and a failure to inspect will render him liable, although ignorant of the defect or danger, if a careful inspection would have informed him thereof.<sup>4</sup> Nor will the mere proof of an inspection relieve the master, unless it is shown to have been a careful one,<sup>5</sup> for he is liable for a careless inspection, the same as though none had been made.<sup>6</sup> However, inspection is only necessary where the employer has superior means of knowledge to the employee, for if the danger is as open to one as to the other to observe, there would be no duty to inspect by the master.<sup>7</sup>

<sup>1</sup> *Bohn v. C. R. I. & P. Co.*, 106 Mo. 429; *Keenan v. Waters* (Pa.), 2 Amer. Neg. Rep. 454.

<sup>2</sup> *Ante, idem.* Evidence that better machinery could be obtained is not competent, as employer is not bound to furnish the best made, but only such as is reasonably safe. *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267.

<sup>3</sup> *Ardesco Oil Co. v. Gilson*, 10 M. M. R. 669.

<sup>4</sup> *McCone v. Gallagher* (N. Y.), 2 Am. Neg. Rep. 618; *Benzing v. Steinway & Sons*, 101 N. Y. 550.

<sup>5</sup> *Ry. Co. v. Ward*, 1 Am. Neg. Rep. 590.

<sup>6</sup> *Durkin v. Sharp*, 88 N. Y. 225; *Egan v. Ry. Co.*, 42 N. Y. Supp. 188; *Car. Co. v. Parker*, 100 Ind. 181.

<sup>7</sup> *Buswell Per. Inj.*, § 211. The law does not require the master to make inspection of shots that have failed to go. *Brown v. King*, 100 Fed.

§ 459. **Clothing catching on machinery.** — It is generally regarded as such an act of contributory negligence, for an employee to wear clothing of such a character as would be liable to catch on open and exposed machinery as would prevent a recovery by him, in case of injury,<sup>1</sup> and this would be particularly true where the employee negligently handled clothing in close proximity to revolving machinery.<sup>2</sup> But where the machinery was not open to view, or was negligently constructed and such an injury would be more liable to occur on account thereof, the master would be liable,<sup>3</sup> and, in any event, in such case, the question of assumed risk is for the jury.<sup>4</sup>

§ 460. **Giant powder—Injuries from explosions.** — Where unexploded shots of giant powder are left in a mine and the ground boss of the retiring crew permits a new crew to enter the mine, without warning them of such danger and an injury occurs from drilling into and exploding the powder, the master is liable.<sup>5</sup> And on account of the dan-

Rep. 561. For cases predicated upon negligence in failing to inspect appliances, see *Bailey's Mas. Lia. for Inj. to S-r.*, 93 to 103; *Bowman v. White*, 110 Cal. 23; *Mo. Coal. Co. v. Schwab*, 74 Ill. App. 567; *Ashland Coal Co. v. Wallace*, 101 Ky. 626; *Smizel v. Iron Co.*, 116 Mich. 149; *Sykes v. St. L. & S. F. Co.*, 88 Mo. App. 193; *Mansfield Coal Co. v. McEnry*, 91 Pa. St. 185; *Chicago Coal Co. v. People*, 181 Ill. 270; 20 Am. & Eng. Enc. Law (2 Ed.), 89. But if inspection retards work (*Island Coal Co. v. Greenwood*, 151 Ind. 476), or if inspection would only develop a matter of common knowledge, it is not necessary. *Garragan v. Falls River Iron Co.*, 158 Mass. 596; *Shea v. K. C. F. S. & M. Co.*, 76 Mo. App. 29; 20 Am. & Eng. Enc. Law (2 Ed.), p. 89.

<sup>1</sup> *Lemoine v. Aldrich* (Mass.), 8 Amer. Neg. Rep. 637.

<sup>2</sup> *Heemke v. Thilman* (Wis.), 8 Am. Neg. Rep. 172.

<sup>3</sup> *Jara-zeski v. Mfg. Co.* (Minn.), 8 Am. Neg. Rep. 441.

<sup>4</sup> *Dempsey v. Sawyer* (N. Y.), 10 Am. Neg. Rep. 285.

<sup>5</sup> *Anderson v. Daly Min. Co.* (Utah), 2 Am. Neg. Rep. 659. Liable for failure to give notice of blast. *Mooney v. Belleville Stone Co.* (N. J.), 4 Am. Neg. Rep. 195.

gerousness of giant powder, as an agency, if the employer permits an employee to use it, who is not acquainted with the proper mode of using it, or the attendant risk, and an injury results from an explosion, the employer is liable.<sup>1</sup> And the employer would also be liable to an employee for an injury from an explosion, resulting from following the directions of a superintendent, or one representing the employer in giving such directions.<sup>2</sup> But where an explosion occurs as a result of the negligence of one who could be termed a fellow-servant, the general rule of non-liability on the part of the master would apply and no recovery could be had for such an injury,<sup>3</sup> any more than if the injury had occurred as a result of the negligence of the employee himself.<sup>4</sup>

<sup>1</sup> *Smith v. Oxford*, 2 M. M. R. 208.

<sup>2</sup> *Camden v. Belleville Stone Co.*, 1 Am. Neg. Rep. 117; *McMahon v. Ida Min. Co.*, 1 *Idem*, 741. "Where, in an action brought against a corporation by one of its laborers employed in blasting, for an injury occasioned by the premature discharge of a blast (while tamping) loaded with newly invented powder (name not given, but described as liable to explode from percussion), which he was directed to use by the defendant's foreman or superintendent, the complaint alleged that the company furnished the powder for use in its ordinary and appropriate business; that its superintendent directed its use, by the plaintiff, in such business; that it had never been used as an explosive in blasting, and was, in fact, unfit and unsafe for such use, and that the plaintiff was ignorant of its dangerous properties: Held, on demurrer, that a right of action was unquestionably stated." *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; M. M. D. 22. Master held liable for injury to employee, from drilling into unexploded blast, which foreman had failed to notify him of. *Anderson v. Daly Min. Co.* (Utah), 2 Amer. Neg. Rep. 659. But see *Vitto v. Farley* (N. Y.), 2 Amer. Neg. Rep. 47, where, on similar state of facts, master is held not liable, on the facts stated, because foreman is a fellow-servant. The Wisconsin courts, however, hold with Utah on this question. *McMahon v. Mining Co.* (Wis.), 1 Amer. Neg. Rep. 741.

<sup>3</sup> *Vitto v. Farley*, 2 Amer. Neg. Rep. 47. No recovery for explosives due to foreman's negligence, as he is a fellow-servant. *Wiskie v. Monticello Granite Co.* (Wis.), 10 Amer. Neg. Rep. 634.

<sup>4</sup> Where explosion occurred by removal of tamping, by employee.

§ 461. **Injury from steam explosion.**—Steam is another dangerous and powerful agency about the use of which the master is bound to advise inexperienced servants, and for injuries resulting from a neglect of this duty,

*Allard v. Hildreth* (Mass.), 5 Amer. Neg. Rep. 610. Where employee is experienced in mining operations and there is no reason why the employer should believe him ignorant of the work and its dangers, he need not notify him of the dangers of giant powder, as he would assume risks from premature explosions. *King v. Morgan* (U. S. C. App.), 8 Am. Neg. Rep. 613; *Tuttle v. R. R. Co.*, 122 U. S. 189; *Hill v. Merritt Co.*, 140 Mo. 433; *Cochran v. Shanahan* (W. Va.), 41 S. E. 140; *Nielson v. Brownstone Co.*, 69 Pac. R-p. 289. But see *Chambers v. Chester*, where plaintiff alleged that he was injured by an explosion in the mine, caused by defendant carelessly and negligently, without warning, furnishing him with giant powder containing forty per cent of nitro-glycerine, instead of twenty-seven per cent, which he had been accustomed to use. There was a verdict for plaintiff for \$5,000, from which defendants appeal. Sustained. (Sup. Ct. Mo., Dec. 1902.) 72 S. W. Rep. 98. In an injury from an exploded blast, resulting from a failure of the hoister to work, the case is properly left to the jury, although plaintiff had knowledge that a chain ladder was not in place before firing the shots, as the question of contributory negligence in this regard was also properly submitted. *Alaska United Gold Min. Co. v. Muset*, 114 Fed. Rep. 66. See also *Orman v. Salvo*, 117 Fed. Rep. 238. A new employee who is injured from explosion by drilling into unexploded shots, of which he had no knowledge, is not barred from a recovery, because the superintendent did not know of the shots, but it is a question of fact, if, under all the circumstances, he should have known it. *Robinson Min. Co v. Tolbert* (Ala. 1901), 31 So. Rep. 519. But see *So. Ind. Co. v. Moore*, 63 N. E. 863. One injured from unexploded shot, by using a steel tamping bar, when master provided an iron one to use, where master had no knowledge of shot, cannot recover. *Lanza v. LeGrand Quarry Co.* (Iowa, 1902), 88 N. W. Rep. 805. "Where the servant is mature, intelligent and experienced in the work, and the master has no notice or reason to believe he is not fully competent and familiar with the work and its attendant dangers, he is under no obligation to instruct such servant as to the probable dangers of his employment, and after having accepted such employment with knowledge of the character and quality of the instrument furnished for use and of the dangers of the employment, such servant cannot assert that he did not know the dangers. Where plaintiff, employed in defendant's mine, and engaged in blast-

there is a corresponding liability.<sup>1</sup> The master would also be liable for an injury from an explosion resulting from the use of defective material, if he had himself superintended the construction of the appliance, or failed to employ a competent machinist so to do.<sup>2</sup> And he would also be responsible for an injury resulting from escaping steam, due to a defect in the pipe, where no proper or regular inspections could be shown.<sup>3</sup> But the mere fact of an injury from escaping steam would be insufficient to predicate a recovery, without evidence of some defect or injury to the machinery or appliances containing the steam,<sup>4</sup> and to avoid liability for such an injury the employer would not be bound to establish that he had employed the safest appliance for the purpose, but such only as was customarily

ing rock, using a machine drill and dynamite for the purpose, was injured by the premature explosion of a charge which he was tamping into a hole drilled to receive it, and was using a tamping bar furnished by defendant, constructed of a piece of iron gas pipe, the end being plugged with wood or clay, and such tools were largely used in other mines, as were also bars of wood and of solid iron, and there was some evidence to show that wooden bars were less dangerous, and where it appeared that plaintiff was twenty-four years of age, was intelligent, and had been employed several months by defendant, and had also been engaged over two years at the same work in other mines, and had, while employed by defendant, used the same kind of tool without objection or accident, and that he knew the dangerous properties of dynamite, and that it was liable to explode by concussion, it was held that he assumed the risks incident to using such tool." *King et al v. Morgan* (United States Circuit Court of Appeals, Eighth Circuit, May, 1901), 10 Amer. Neg. Rep. 200.

<sup>1</sup> *Turner v. Tunnel Co.*, 1 Am. Neg. Rep. 270.

<sup>2</sup> *Ardesco Oil Co. v. Gilson*, 10 M. M. R. 669.

<sup>3</sup> *Russell v. Consolidated Co. (Cal.)*, 2 Amer. Neg. Rep. 299.

<sup>4</sup> *Voight v. Car. Co. (Mich.)*, 2 Amer. Neg. Rep. 725. One who operates a steam boiler on his premises without negligence, is not legally liable to his neighbors for an explosion, as there is no corresponding duty. *Veith v. Hope Salt & Coal Co. (W. Va. 1902)*, 41 S. E. Rep. 187.

employed in the same business, by reasonably prudent persons,<sup>1</sup> and if the explosion occurred by reason of a fellow-servant, there would be no liability.<sup>2</sup>

§ 462. **Bad air or gas.** — It has been held that the duty to warn the servant of the dangers incident to mining included the obligation to advise those unacquainted, with the fact that the mine contained impure or poisonous air, and for a failure to discharge the duty the master was liable.<sup>3</sup> Proper ventilation and means of circulating pure and wholesome air should be provided and although the means may be provided, if there is a failure to furnish pure air in a given case, damages would lie for such injury.<sup>4</sup> However, the owner would not be liable for a failure to keep the mine absolutely free from gas, or impure air,<sup>5</sup> but the duty devolved upon him would be to introduce pure air, as fast as the gas formed, so that by dilution, it would be expelled, or rendered harmless, and not permit it to accumulate as standing gas.<sup>6</sup>

<sup>1</sup> *Innes v. Milwaukee* (Wis.), 2 Amer. Neg. Rep. 782.

<sup>2</sup> A case where superintendent, making test, permitted steam to escape, and it was held he was a fellow-servant. *Meeker v. Remington Co.* (N. Y.), 8 Amer. Neg. Rep. 314.

<sup>3</sup> *Turner v. Tunnel Co.*, 1 Amer. Neg. Rep. 270. "Employer must warn employee, or be liable for dangers known only to him." *Strahendorf v. Rosenthal*, 10 M. M. R. 676. But see, *contra*, *Consolidated Co. v. Scheeler*, 42 Ill. App. 619.

<sup>4</sup> *Commonwealth v. Hutchinson* (Pa.), 4 C. C. R. 18. For injuries from accumulated gases, see *Muddy Valley Co. v. Phillips*, 39 Ill. App. 376; *Hughes v. Imp. Co.*, 20 Wash. 294; *Cerillos Coal & Co. v. Deserant*, 9 N. Mex. 49; *Godfrey v. Beattyville Co.*, 101 Ky. 339; *Mosgrove v. Zimbelman Coal Co.*, 110 Iowa, 169; 20 Am. & Eng. Enc. Law (2 Ed.) 58. Courts will take judicial notice that coal mines generate gas. *Poor v. Watson*, 92 Mo. App. 89.

<sup>5</sup> *Commonwealth v. Tompkins* (Pa.), 1 L. L. R. 341; s. c. 4 Legal Gaz. 238.

<sup>6</sup> *Ante, idem*. "Working after warning is such contributory negligence as to prevent recovery." *Lehigh Valley Co. v. Jones*, 10 M. M. R.

§ 463. **Failure to furnish props.** — Independently of statute it would be negligence on the part of a mine owner to fail or refuse to furnish sufficient props or timbers to protect employees from injuries resulting from falling

80. And see *Cerrillos v. Deserant* (N. M.), 4 Amer. Neg. Rep. 87. There is no liability for an explosion from gas, in an unused part of the mine to which miner had gone, with lamp, as the failure to inspect that part of the mine, if such duty existed, was negligence of the foreman, a fellow-servant with deceased miner. *Grant v. Arcadia Coal Co.*, 84 N. S. 819. No recovery can be had for death of employee from explosion, caused by pit boss taking light into pit where there was accumulated gas, as he was fellow-servant. *Deserant v. Cerrillos Coal & Co.* (N. M. 1901), 5 Amer. Neg. Rep. 206. The United States statute (Sec. 6, Act March 3, 1891; 26 Stat. at L. 1104), makes it the duty of all mine owners in mines over 100 feet, to furnish not less than 55 cubic feet of pure air per second, for every fifty men at work, which shall be forced to the face of each working place, so as to expel noxious gases. The duty of the mine owner, under this act, is a positive one and an instruction which predicates the duty upon what a *reasonable man* would do, rather than what the act commands, is erroneous. *Deserant v. Cerrillos Coal & Co.*, 178 U. S. 409; 44 L. Ed. 1127. And for similar holdings, upon statutes of different States, see *Graham v. Newburg Co.*, 88 W. Va. 278; 18 S. E. Rep. 584; *Mosgrove v. Coal Co.* (Iowa), 81 N. W. Rep. 227; *Muddy Valley Co. v. Philipps*, 89 Ill. App. 876; *Hall v. Hopwood* (Eng.), 15 M. M. R. 42; 49 L. J. Mag. Cas. 17; *Summer v. Carbon Hill Co.* (Wash.), 89 Fed. Rep. 54. But a compliance with the statute and employment of competent "fire boss" relieves the mine owner of further liability. *Delaware & Co. v. Carroll*, 89 Pa. St. 374; *Redstone Co. v. Roddy*, 115 Pa. 364; 8 Atl. Rep. 598. The duty is only to provide ventilation for the "mine" being worked and not as to abandoned portions. *Coal Co. v. Jones*, 127 Ill. 379; 20 N. E. Rep. 89; *Welsh v. Lehigh & Co. Coal Co.* (Pa.), 8 Cent. Rep. 386. The failure to comply with the statute must have been the approximate cause of the injury. *Coal Run Co. v. Jones*, 127 Ill. 379; 20 N. E. Rep. 89. And contributory negligence will defeat a recovery, notwithstanding a violation of the statute. *Krause v. Morgan*, 53 Ohio St. 26; 40 N. E. Rep. 886. "Mines generating gas," includes all mines generating noxious gases and vapors, whether explosive or not. *Poor v. Watson*, 92 Mo. App. 89; *Coal Co. v. Wilson*, 47 Kansas, 460. And negligence of "fire boss" renders master liable. *Schmalstieg v. Leavenworth Coal Co.* (Kan.), 59 L. R. A. 707. But the most expensive precautions against "fire damp" need not be employed, but only such as are customarily used. *Berns v. Coal Co.*, 27 W. Va. 285.



earth and rock,<sup>1</sup> but statutes have been passed in most of the mining States upon the subject, in order to insure the safety and protection of workmen.<sup>2</sup> Where the condition of the ground is such that timbering should follow immediately after the shots, to keep it safe, a failure to timber within a reasonable time, and a resulting injury, will be sufficient evidence to sustain a verdict.<sup>3</sup> And where the statute makes it the duty of the owner to furnish props, he cannot delegate the duty to another, but should have props of the proper and required dimensions delivered to the workmen in the chamber of the mine to be used by them when required.<sup>4</sup> But the only duty upon the owner is to furnish the timbers and it then devolves upon the employee to use them;<sup>5</sup> and for an

<sup>1</sup> MacSwiney on Mines, p. 612; Bar. & Adams, p. 788 *et sub.*; *Trihay v. Brooklyn Co.*, 15 M. M. R. 585.

<sup>2</sup> Sess. Laws Colo. (1885), pp. 137-141; Ill. Act 1872; Iowa Laws 1880, Ch. 202; Ind. Mch. 2, 1891; Maine, R. S., Ch. 17, Secs. 23 and 24; Mo. R. S. 1899; Ohio R. S. 6871; Pa. Act Mar. 3, 1870.

<sup>3</sup> *Trihay v. Brooklyn Co.*, *supra*; *Hammon v. Cent. Coal & Co.*, 156 Mo. 234; *Smith v. Coal Co.*, 75 Mo. App. 177. Whether servant relied upon superior knowledge of superintendent as to necessity for props, for jury. *Frank v. Bullion Beck Co. (Utah)*, 5 Amer. Neg. Rep. 733. Where there was evidence that the timbers supporting the roof were rotten and unsafe and that the master knew this fact; that a mule an employee was driving ran against a support and knocked it down, but that it would have stood if it had not been defective, the employer was held liable for the injury. *Kaltinsky v. Wood (Ky., Dec. 1901)*, 65 S. W. Rep. 848. Where there is evidence of a failure to properly timber a mine, the mere fact that at the time of his injury, an employee was acting beyond the scope of his employment, at request of foreman, would not prevent a recovery. *Frank v. Bullion Min. Co. (Utah)*, 5 Amer. Neg. Rep. 733. But contributory negligence and the defense of assumed risk will bar a recovery, in a case based on statutory negligence of failure to timber, the same as other breaches of duty. *Adams v. Coal Co.*, 85 Mo. App. 486.

<sup>4</sup> *Com. v. Richmond*, 2 C. P. Rep. (Penn.) 189; Bar. & Adams Mines, p. 784; *Coal & Min. Co. v. Clay*, 51 Ohio, 541.

<sup>5</sup> *Victor Coal Co. v. Mulr*, 20 Colo. 320.

injury from a failure to use the props after they had been furnished, the contributory negligence of the employee would bar a recovery.<sup>1</sup> No recovery can be had where the necessity for props was apparent and the employee remained at work, knowing the condition, after failure to furnish by the owner.<sup>2</sup> A demand for props is usually a prerequisite to liability of the owner under the statute,<sup>3</sup> and unless a demand, or, what is equivalent — a knowledge on the part of the owner, of the necessity for props, — can be shown, the owner would not be liable for an injury,<sup>4</sup> unless a case of negligence at common law could be made out.<sup>5</sup>

§ 464. **Defective scaffolds and platforms.** — As a general rule the employer can properly leave to the discretion of the employees the construction of scaffolds or platforms upon which they are to work, without resulting liability on his part for injuries;<sup>6</sup> an employee assumes the risk of injury from the falling of a scaffold constructed by himself,<sup>7</sup> and ordinarily those built by a fellow-servant.<sup>8</sup> But where the construction of a scaffold was ordered and

<sup>1</sup> *Ante, idem.* Coal Co. v. Young, 24 Ill. App. 255; Coal Co. v. Estievenard, 53 Ohio St. 43.

<sup>2</sup> Coal Co. v. Estievenard, *supra*. A failure to use timbers furnished is such contributory negligence as will bar a recovery. Christner v. Coal Co., 146 Pa. St. 67; Coal Co. v. Muir, 20 Colo. 320; Sugar Cr. Min. Co. v. Peterson, 177 Ill. 324; 20 Am. & Eng. Enc. Law (2 Ed.), 140.

<sup>3</sup> Leslie v. Rich Hill Coal Co., 110 Mo. 81; Coal Co. v. Estievenard, 53 Ohio, 43; Com. v. Richmond (Pa.), 2 C. P. P. R. 189.

<sup>4</sup> *Ante, idem.* Victor Coal Co. v. Muir, 20 Colo. 320. Under the Ohio statute it is not necessary that the employee demand timbers to render the master liable for neglect to furnish. Pittsburg &c. Coal Co. v. Estievenard, 40 N. E. Rep. 725.

<sup>5</sup> Coal Co. v. Young, 24 Ill. App. 255.

<sup>6</sup> Arnold v. Eastman, 57 N. E. 209; Goshen v. Gilbert, 165 Mass. 443; McKay v. Hand, 168 Mass. 270.

<sup>7</sup> Brady v. Norcross, 172 Mass. 331.

<sup>8</sup> Arnold v. Eastman, 57 N. E. Rep. 209.

superintended by the master and an injury resulted from its defective construction, he would not be relieved of liability because a fellow-servant had selected the material;<sup>1</sup> nor would ignorance of the defect in the scaffolding be a defense, as an inspection would have disclosed the danger,<sup>2</sup> and so it is held that the fact that a platform or scaffold fell, together with a resulting injury, establishes a *prima facie* case for the plaintiff.<sup>3</sup>

§ 465. **Injury on ladder.** — Substantially the same rule of liability obtains for an injury from a defective ladder as that in the case of scaffolding, and for injuries from a broken<sup>4</sup> or defective<sup>5</sup> ladder the master is, generally, liable, and he is answerable for the negligence of his foreman or vice-principal for injuries resulting from their

<sup>1</sup> *Kansas City Co. v. Sawyer* (Kan.), 4 Am. Neg. Rep. 152; *Cole v. Warren Co.* (N. J.), 7 Am. Rep. 98; *Edward Hines Co. v. Ligas* (Ill.), 4 Am. Neg. Rep. 257; *Sharman v. Bishop Co.* (R. I.), 10 Am. Neg. Rep. 471. But see, *contra*, *Olsen v. Nixon* (N. J.), 4 Am. Neg. Rep. 515; *Maher v. McGrath*, 58 N. J. Law, 469; *Offutt v. World's Cal. Co.* (Ill.), 5 Am. Neg. Rep. 16.

<sup>2</sup> *McCane v. Gallagher* (N. Y.), 2 Am. Neg. Rep. 613; *Benzing v. Steinway & Son*, 101 N. Y. 550; *Doyle v. M., K. & T. Tr. Co.* (Mo.), 2 Am. Neg. Rep. 589.

<sup>3</sup> *Stewart v. Ferguson*, 65 N. Y. Supp. 149. But see *Arnold v. Eastman*, 57 N. E. 209; *McKay v. Hand*, 168 Mass. 270. An employee does not assume liability for defects from rotten boards in derrick to coal platform, simply because they had existed for years; he has a right to rely on the rule that his employer will furnish him a safe place to work. *McLean County Coal Co. v. Simpson*, 97 Ill. App. 21. Where plaintiff was injured by a rotten board in derrick that had been built five years and there was no recent inspection proven, case was properly left to jury. *Ouellette v. Michigan Alkali Co.* (Mich. 1901), 89 N. W. Rep. 436. In *Westland v. G. C. Mining Co.* (101 Fed. Rep. 59), the liability was predicated upon failure to provide a safe scaffolding or platform to work upon.

<sup>4</sup> *Flanigan v. Guggenbhelmer Smelter Co.* (N. J.), 7 Am. Neg. Rep. 113.

<sup>5</sup> *Reese v. Morgen Silver Min. Co.* (Utah), 4 Amer. Neg. Rep. 85; *Carterville Coal Co. v. Abbott* (Ill.), 7 Am. Neg. Rep. 40.

acts, or omissions in connection with ladders, the same as other appliances.<sup>1</sup> But an owner is not responsible for a ladder being thrown out of adjustment by a fellow-servant,<sup>2</sup> and some of the authorities have distinguished between the liability from a defective ladder and a scaffold, or platform, to be adjusted as the work progressed.<sup>3</sup>

<sup>1</sup> *New Omaha Co. v. Baldwin* (Neb.), 10 Am. Neg. Rep. 117.

<sup>2</sup> *Olsen v. Nixon*, 61 N. J. Law, 671.

<sup>3</sup> *Maher v. McGrath*, 58 N. J. Law, 469. A miner who steps from ladder into hole in derrick, left by direction of foreman, is not guilty of contributory negligence, if he had no knowledge of the hole. *Downey v. Gemini Mining Co.* (Utah, 1902), 68 Pac. Rep. 414. Where an employee was injured from an insecure ladder, from one side of which another employee had removed waste that supported it, and where from the evidence it was questionable if the employee who occasioned the injury was a fellow-servant, it was proper to submit the issue to the jury. *Dryburg v. Mercur G. M. & M. Co.* (Utah), 5 Amer. Neg. Rep. 253.

## CHAPTER II.

### ACTIONS BETWEEN LESSOR AND LESSEE.

**SECTION 466. Injury to lessor's reversion.**

467. Breach of covenant in lease.

468. Warranty—Covenant for quiet enjoyment.

469. Inundations of mines.

470. Injury to lessee by third persons.

471. Injuries to adjoining landowner.

472. Actions against adverse claimants—Quieting title.

473. Action for possession of mineral.

474. How lessor may recover possession.

475. Same—Lessee cannot defend on verbal contract for new lease.

476. Removal of fixtures.

477. Prevention of waste by lessor.

478. Same—Breach of condition—Removal of machinery.

§ 466. Injury to lessor's reversion. — The right of the lessor of mining land, as the surface owner, to claim the proper support for the surface, will not be defeated by any special stipulation, unless it is expressly included,<sup>1</sup> and in all leases of mining land, where the surface is retained by the lessor, there is a legal presumption that he reserves to himself the right to claim support for the surface.<sup>2</sup> If the lessee by an improper working of the mine commits any act that would result injuriously to the lessor's reversion the latter can maintain an action of trespass on the case against the lessee,<sup>3</sup> or if the lessee exceeded the limits of the rights which he held under the lease, an injunction

<sup>1</sup> *Smart v. Morton*, 5 El. & Bl. 20; 30 Eng. L. & E. 385.

<sup>2</sup> A custom contrary to a right of surface support held invalid. *Coleman v. Chadwick*, 80 Pa. St. 81.

<sup>3</sup> *Ande, idem*.

would lie to restrain him from injuring lessor's reversion.<sup>1</sup> Independent of the question of injury to buildings on the surface, by a removal of subjacent strata, if there is no title or right appearing, to qualify or limit the right and title of the surface owner, the owner of the minerals and subsoil is legally liable for an interference with the rights of the surface owner, and "must leave support sufficient to sustain the surface in its natural state."<sup>2</sup> And where there are buildings on the surface, and the mines are worked in a way to cause them to give way, such working will be restrained, although the mines had been worked with ordinary care and "not within forty perpendicular yards of the foundation of the buildings."<sup>3</sup> But an injunction will not be granted to restrain a lessee from working a mine, merely because he had not worked the same regularly, or in such manner as would best subserve the interests of the lessor;<sup>4</sup> nor will an injunction lie to restrain a lessee from blasting in the night time, when it is the custom to work at night, merely because it disturbs the lessor's slumbers, and indirectly affects his own and his family's health.<sup>5</sup>

<sup>1</sup> *Marvin v. Brewster Iron Co.*, 55 N. Y. (10 Sick.) 538; *Marker v. Kenrick*, 18 C. B. 188; s. c. 22 L. J. (N. S.) C. P. 129; *McDonald v. McKentil*, 10 Irish (L. R.), 574.

<sup>2</sup> *Humphreys v. Bragden*, 12 Q. B. 739; 1 Eng. L. & E. 241.

<sup>3</sup> *Haines v. Roberts*, 7 El. & Bl. 625; *Roberts v. Haines*, 6 El. & Bl. 613; 37 Eng. L. & E. Rep. 1. A lessee is guilty of waste if he commits an act that changes the nature or character of the demised premises. *West Ham Cent. Bd. v. Waterworks Co.* (Eng. 1900), 69 L. J. Ch. 257; 1 Ch. 624.

<sup>4</sup> *Clavering v. Clavering*, 2 P. W. 388.

<sup>5</sup> *Davis v. Shepherd*, 35 L. J. Ch. 581; s. c. L. J., 1 Ch. App. 410; *Marvin v. Brewster Iron Co.*, 55 N. Y. (10 Sick.) 538; s. c. 14 Am. Rep. 322. "Cases which contain discussions as to the rights of persons with limited or qualified interests in mines, are chiefly actions for waste, in all of which the distinction between the rights of tenants for life, for years, and at sufferance, tenants in common, and tenants in

§ 467. **Breach of covenant in lease.** — A lessor cannot disaffirm his own lease, merely because the continuance of the tenancy is unprofitable to him,<sup>1</sup> and when mining is the only use to which the premises can be put, it is not considered waste in the tenant to carry on mining operations on such premises.<sup>2</sup> In all cases where the lessee of mines violates the covenants of his lease, or commits waste on the leased premises, the utmost degree of diligence and promptitude is required of the lessor, on account of the peculiar nature of the property, and where he has stood by without objection and allowed the lessee to expend large sums in the development of the mines, he cannot afterward complain that the lessee

dower, to work unopened mines, and their rights to work opened mines, is almost invariably drawn with great care and precision, and this from the earliest times. Thus says Lord Coke: "A man hath land in which there is a mine of coals or of the like, and maketh a lease of the land (without mentioning any mines) for life, or for years; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that is waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease made of the land, together with all the mines therein, there the lessee may dig for mines, and enjoy the benefit thereof; otherwise those words would be void." (Co. Litt. 54b; 17 E. 3, 7, 9, 11, 6, 66; 5 Co. 12; Bac. Abr. Waste, C. 8.) "Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waste, but the tenant may dig for gravel or clay, for the reparation of the house." (Co. Litt. 57.) "As mines and timber were considered part of the inheritance, no one was considered entitled to have power over them, but he who had an estate of inheritance limited to him. Therefore, one having only an estate for life, subject to waste, had no right to open a mine." (Whitfield v. Bewit, 2 P. Wms. 240; Co. Litt. 37a.) Blanch. & Weeks Lead. Cas. 322.

<sup>1</sup> Wentworth v. Turner, 3 Ves. 4.

<sup>2</sup> Montgomery v. Walker, 36 Geo. 515.

had violated the covenants of his lease.<sup>1</sup> However, in a general lease of land containing a covenant against waste, while the operation of opened mines on the land would perhaps not be held a violation of this covenant,<sup>2</sup> the lessee would be limited to the operation of such mines as were opened at the commencement of his term, and if he should open new mines he would be held to have violated the covenant against waste.<sup>3</sup>

<sup>1</sup> *Norway v. Rowe*, 19 Ves. 159; *Parrott v. Palmer*, 8 Myl. & K. 632. But as to when estoppel will prevent damages, see *Moye v. Yoppen*, 23 Cal. 306.

<sup>2</sup> *Campbell v. Lesch*, Amb. 740; *Owings v. Emery*, 6 Gill. (Md.) 260; *Saunders' Case*, 5 Co. R. 12; *Clegg v. Rowland*, Law R. 2 Eq. 160. But in the United States it has been frequently held that a farming lease did not authorize the working of even opened mines. *Freer v. Stotenbur*, 2 Abb. App. (N. Y.); reversing 36 Barb. 641; *U. S. v. Gratlot*, 14 Pet. 526; *Gowan v. Christie*, 5 Moak, 114. "The same restriction against working an unopened mine also obtains, unless the right to work is expressly granted by the owner of the reversion; but when it is open, a lease, in general terms, of the land in which it exists, carries the right of the lessee to work it." *Freer v. Stotenbur*, 36 Barb. 641; *Owen v. Emery*, 6 Gill. Md. 260; *B. & W. L. C.* 324.

<sup>3</sup> *Clegg v. Rowland*, *supra*. "A covenant to use all reasonable diligence to sink a shaft to the salt rock in a lease of a rock-salt mine known to be flooded with brine: *Held*, to require the lessees to sink the shaft deeper than it was, although it might be an unreasonable application of time and labor." *Jarvis v. Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41; *M. M. D.* 191. "Where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their land and repair of their houses: *Held*, that this was an implied covenant; that he would also burn lime at all such seasons, and that it was not a good defense to plead that there was no lime burned on the premises out of which the lessor could be supplied." *Shrewsbury v. Gould*, 2 B. & Ald. 487; *M. M. D.* 191. "A lease of mines contained a covenant that if the lessor should at any time before the expiration or determination of the lease, give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, implements, etc., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned.



But if the tenancy of the lessee has expired and his interest in the mine and his right to work it under the lease have been terminated, an injunction will lie to prevent him from taking mineral from the mine and when by the terms of the lease he is not to remove the machinery from the mine, he can be restrained from violating this provision of the lease.<sup>1</sup> If the demised premises are limited to a certain use or occupation, a court of equity will ordinarily interfere to prevent the lessee from violating this provision of his covenant, whether the act complained of would amount to a nuisance in law, or not,<sup>2</sup> and where the lessee is confined to mining alone, any use of the premises for purposes other than that of mining would be held to constitute a breach of covenant, and this would be sufficient to warrant the chancellor to interfere in behalf of the lessor.<sup>3</sup>

§ 468. **Warranty — Covenant for quiet enjoyment.** — Generally speaking, an outstanding mining lease, under which all the mineral under the demised tract had been extracted previous to the sale, will not constitute a breach of a covenant for quiet enjoyment, provided no operations are carried on subsequent to the sale and conveyance of such tract of land.<sup>4</sup> Nor will the existence of an outstanding revocable license to enter and take ore from the tract of land sold constitute a breach of a warranty under the covenant for quiet enjoyment in the sale of such tract,<sup>5</sup> for

*Held*, that the covenant was so injurious and oppressive to the lessee that the court ought not to enforce it, or to grant an injunction to prevent a breach of it." *Talbo v. Ford*, 18 Sim. 178; M. M. D. 191.

<sup>1</sup> *Hamilton v. Dunford*, 6 Irish (Ch.), 412.

<sup>2</sup> *Stewart v. Winters*, 4 Sandf. Ch. 587; *Macher v. Foundling Hospital*, 1 Ves. & B. 188.

<sup>3</sup> *Bromwell v. Lacy*, 10 Ch. D. 691.

<sup>4</sup> *Spoor v. Green*, L. R. 9 Ex. 99 (Kelly, C. B., *dissents*).

<sup>5</sup> *Gesner v. Cairns*, 2 Allen (N. B.), 595.

in both of such cases the parties are presumed to contract with reference to the condition of the premises at the time of the sale, and unless there is some future disturbance of the purchaser's right of possession, there cannot be, strictly speaking, any breach of the covenant for quiet enjoyment.<sup>1</sup> But a deed of all the mineral under a certain tract would constitute an incumbrance within the meaning of a covenant of warranty, in a sale of such tract.<sup>2</sup> And so a working of mines upon a tract under an outstanding lease or license, subsequent to the sale of such tract, if the conveyance was not made subject to such lease or license, would be in contravention of a covenant for quiet enjoyment.<sup>3</sup> But the vendor in such a conveyance would not be responsible for a removal by such a lessee, subsequent to the sale, of mineral previously extracted under his lease,<sup>4</sup> nor would he be liable for mineral taken

<sup>1</sup> Tiedeman R. P., §§ 187, 854. "By indenture, the defendant demised to the plaintiffs a coal mine for a term of years, with liberty to dig and sink pits, etc., for obtaining the coal; and the defendant covenanted with the plaintiffs that they might peaceably and quietly have, hold, occupy and possess, and enjoy the mine during the term, without any molestation, interruption or disturbance whatever, of, from, or by the defendant. After the making of the indenture, the defendant excavated a quarry of iron-stone, lying under some of the closes under which the demised mine was situate, but above that mine, and made holes from the strata of iron-stone into the demised mine, and thereby caused quantities of water to percolate into the demised mine; and the defendant also, by excavating the quarry, caused parts of the roof of the demised mine to fall in, so that by reason of the premises the demised mine became flooded, and the working of the coal was rendered impracticable. *Held*, that, though the defendant had a right to excavate the quarry; yet, as the excavation had caused an interruption of the plaintiffs' occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment." *Shaw v. Stenton*, 2 H. & N. 858; M. M. D. 190.

<sup>2</sup> *Stambaugh v. Smith*, 23 Ohio St. 585.

<sup>3</sup> *Shaw v. Stento*, 2 H. & N. 858; *Hartford S. O. Co. v. Miller*, 41 Conn. 113; *Spoor v. Green*, *supra*.

<sup>4</sup> *Spoor v. Green*, L. R. 9 Ex. 99.

which was not authorized by the lease, for this, instead of constituting a breach of covenant, would be a simple act of trespass on the part of the lessee.<sup>1</sup>

§ 469. **Inundation of mines.** — The right of the mine owner to the free and unrestricted use of running water is broader and more rational than that recognized by the courts at common law. The law, as it now stands, in this regard, is based upon the principle that the individual has the legal right to receive the greatest possible benefit from his own property, and when acting in good faith and within a reasonable exercise of his own rights, he cannot be held responsible for an injury to the land of his neighbor, unless it is shown that he entertained an evil intent toward his neighbor, and that with reasonable diligence he could have avoided the injury to his property.<sup>2</sup> A mine owner has the right to work his mine in the manner most advantageous to himself, and if he conducts his operations in a reasonable manner, he will not be liable to the surface owner for a loss of water occasioned by his work,<sup>3</sup> nor to the owner of an adjoining mine, for an injury caused by water which flowed according to the laws of gravitation.<sup>4</sup> But although each mine owner is entitled to use the running water of a stream in a proper and reasonable man-

<sup>1</sup> *Ante, idem.* "An outstanding, revocable parol license to take minerals is no breach of a covenant of warranty." *Gesner v. Cairns*, 2 Allen (N. B.), 595; M. M. D. 206. Where a lessee has an exclusive lease or license to bore for oil, lessor will be enjoined from drilling on the leasehold. *Westmoreland Nat. Gas Co. v. DeWitt*, 130 Pa. St. 235.

<sup>2</sup> *McKnight v. Ratcliff*, 44 Pa. St. 156; *Clark v. Willet*, 35 Cal. 534.

<sup>3</sup> *Coleman v. Chadwick*, 80 Pa. St. 81; s. c. 21 Am. Rep. 93; *Front v. McDonald*, 83 Pa. St. 144.

<sup>4</sup> *Baird v. Williamson*, 15 C. B. (N. S.) 376; s. c. 33 L. J., C. P. 101; *Tillotson v. Smith*, 32 N. H. 90.

ner, he is still responsible for injuries to his adjoining property holders that are caused by an unreasonable exercise of his right, or which could be approximately attributed to his negligence in carrying on his mining operations. If he fails to use reasonable diligence to prevent the flow of water from his own into an adjoining mine;<sup>1</sup> or if he has been an active agent in sending the water into such mine, he will be responsible to the adjoining mine owner for the injury caused by reason of the inundation.<sup>2</sup> And when the injury is irremedial in its nature, and the mine owner is not able to respond in damages for the injury, if there is no adequate remedy at law, an injunction will be granted the injured mine owner to protect his mine from an injury caused by water from the adjoining mine.<sup>3</sup>

§ 470. *Injury to lessee by third persons.*—When the lessee of mining property is lawfully in possession of the same, he is entitled to all the remedies for unlawful entries or other injury which affects his right of possession, or his rights in personal property, that the actual owner would have under similar circumstances.<sup>4</sup> At common law the action of trespass was the proper remedy for injuries of this nature,<sup>5</sup> and under the codes of most of the States the same principles govern the present remedy of the lessee that obtained at common law.<sup>6</sup> If the injury affects

<sup>1</sup> *Locust Mountain Coal Co. v. Gorred*, 9 Phil. (Pa.) 247.

<sup>2</sup> *Tillotson v. Smith*, 32 N. H. 90. "A covenant for quiet enjoyment contained in the lease of a mine is broken by the act of the lessor in working another mine into it and drowning the mine which he had let with such covenant." *Shaw v. Stenton*, 2 H. & N. 858; *M. M. D.* 190.

<sup>3</sup> *Duke of Beaufort v. Morris*, 6 Hare, 340; *Thomas v. Jones*, 2 Y. & C. C. 510; *Logan v. Driscoll*, 19 Cal. 623; *Atkinson v. Peterson*, 20 Wall. 508 (1 Mont. Terr. 561).

<sup>4</sup> *Paine v. Alderson*, 1 Arnold, 329; *Keyse v. Powell*, 2 El. & Bl. 132.

<sup>5</sup> *Rowe v. Bradley*, 12 Cal. 228.

<sup>6</sup> See statutes, different States.

the reversion of the lessor, he and the lessee can sometimes bring separate actions for the injury,<sup>1</sup> but as a general rule the lessor cannot maintain a separate action, when the lessee is in possession.<sup>2</sup> A lessee for years can maintain an action against his lessor for an unlawful entry or appropriation of the mineral, after it has been severed from the soil, and as the mineral, after its severance from the soil, is regarded as the personal property of the lessee, his proper remedy would be *replevin*.<sup>3</sup> If the lessee is in under a mere tenancy at will, or at sufferance, he cannot, generally, maintain an action against his lessor, even though he has been violently dispossessed by the lessor,<sup>4</sup> but this does not prevent the assignee of a lessee for years from maintaining such an action,<sup>5</sup> and even if the original lessee was in under a mere parol lease, by which he could enter and mine, he would thereby acquire such an interest as to enable him to successfully maintain an action against a third person for unlawfully mining on such land.<sup>6</sup>

§ 471. *Injuries to adjoining landowner.* — Under the rule that one must use his own so as not to injure others in the enjoyment of their legal rights, the landowner, although permitted to use his property for the carrying on of any lawful trade or calling, is prevented from using his land in such a manner as to render valueless the land of an adjoining property holder, or from creating a nuisance in

<sup>1</sup> The lessee for injury to the possession; the lessor for injury to his estate.

<sup>2</sup> *Foster v. Elliott*, 33 Iowa, 216; *Trout v. Hardin*, 50 Ind. 165.

<sup>3</sup> *Grubb v. Bayard*, 2 Wall. Jr. (C. C.) 81; *Forbes v. Gracy*, 94 U. S. (4 Otto) 762.

<sup>4</sup> *Hyatt v. Wood*, 4 Johns. 150; *Desloge et al. v. Peirce*, 38 Mo. 600, a leading case.

<sup>5</sup> *Carter v. Jarvis*, 9 Johns. 143.

<sup>6</sup> *Gunter v. Atkinson*, 35 Wis. 48.

the prosecution of his own work, to premises adjoining his own. A mine owner has no right to conduct his mining operations so that the rock occasioned by his blasts would be thrown upon the premises adjoining his own,<sup>1</sup> and although his acts may not amount to an actual trespass upon such adjoining premises, he can be held responsible by the owner of such premises for an injury which results approximately from his own negligence in conducting his mining operations.<sup>2</sup> But a mine owner cannot, generally, be held responsible for an injury to the mine of an adjacent landowner, even though his own acts may have helped to produce the injury complained of, when the injury itself was the immediate result of natural causes, and could not be attributed to his own default or negligence,<sup>3</sup> and while the mine owner could be held responsible when the injury could have been avoided by the exercise of reasonable diligence on his part, if the adjacent landowner had himself been guilty of contributory negligence, as where he built so near his neighbor's land as to cause resulting injury to the buildings by the use of his premises by the adjoining owner, this, in law, would exempt the owner of the mine, and he could not be held liable in an action for such

<sup>1</sup> *Hay v. The Cohoes Co.*, 2 N. Y. (Comst.) 159.

<sup>2</sup> *Pappelwell v. Hodkinson*, L. R. 4 Ex. Ch. 248; *Thurston v. Hancock*, 13 Mass. 220; *Moody v. McClelland*, 39 Ala. 45. "The defendants demised a coal mine to one Lewis, with the usual covenants, reserving, amongst other things, the right to view and examine the mine, and to re-enter for non-payment, neglect, etc. During the term, plaintiff's house, built on the surface, over the mine, was, as the jury found, injured from negligent working of the mine: *Held*, that the lessors were not liable for the results of their tenant's negligence." *Offerman v. Starr*, 2 Pa. St. 395; M. M. D. 83, 245.

<sup>3</sup> *Smith v. Kenrick*, 7 C. B. 505; 18 L. J. (N. S.) C. P. 172; *Fletcher v. Rylands*, 3 Hurl. & Colt. 778.

injury, even though he had failed to use ordinary diligence in his mining operations.<sup>1</sup>

§ 472. **Actions against adverse claimants — Quieting title.** — When the party in possession of mining property wishes to perfect his title against a person claiming an interest in such property, adverse to the party in possession, the latter can bring an action against such adverse claimant, in the nature of a suit to quiet the title to the property in dispute.<sup>2</sup> Such an action may be maintained whenever the party in possession can furnish evidence sufficient to prove that his title is clear, and when from the surrounding circumstances justice would require that his title should be quieted.<sup>3</sup> A court of equity will not interfere unless some equity is apparent in favor of the party in possession, and there appears to be some cloud against his title. But where injury is likely to ensue to the party, unless the cloud is removed from his title, the relief would generally be granted.<sup>4</sup> Some of the authorities hold that possession by the plaintiff is absolutely necessary in an action to remove a cloud, and although it is the correct view concerning most statutory actions, as it would cut off the remedy entirely from the remainderman, where the action was instituted during the continuance of the particular estate, the more equitable doctrine is that possession is not a necessary prerequisite to the action, but where con-

<sup>1</sup> *Farrand v. Marshall*, 21 Barb. 409; *Richardson v. Ry. Company*, 25 Vt. 465; *Charles v. Rankin*, 22 Mo. (1 Jones), 566.

<sup>2</sup> *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30.

<sup>3</sup> *Alsop v. Eckles*, 81 Ill. 424; *Parker v. Stevens*, 59 N. H. 203; *Handy v. Noonan*, 51 Miss. 166; 51 Miss. 789.

<sup>4</sup> *Orton v. Smith*, 18 How. 263; *Munson v. Munson*, 28 Conn. 582; *Gamble v. Loop*, 14 Wis. 465; *Moore v. Cord*, 14 Wis. 213; *Fornham v. Campbell*, 34 N. Y. 480; *Bispham Pr. Eq.*, p. 614 *et sub.*

structive possession can be proven by the plaintiff, this would be sufficient to entitle him to the remedy.<sup>1</sup>

§ 473. — **Action for possession of mineral.** — When the mineral has once been severed from the soil it is regarded as mere personal property, and when the owner is injured in any of his rights, concerning such property, he can maintain the same actions that would lie in respect to other kinds of personal chattels.<sup>2</sup> From the theory that obtains, it would seem that minerals, before their severance from the soil, and while still in their natural state, are to be regarded as an interest in the land, and the owner in the acquisition of his title, would be governed by the fourth, instead of the seventeenth section of the statute of frauds.<sup>3</sup> When they have been severed from the soil, however, they are within the seventeenth section of the statute, and according to the construction given this statute, in regard to natural products of the soil, it would seem that if the minerals were to be severed within a reasonable time, and the purchaser did not expect to derive any further benefit by reason of their connection with the soil, the sale could be held to fall within the seventeenth section of the statute.<sup>4</sup>

<sup>1</sup> *Prellus v. Jef. G. & S. Co.*, 34 Cal. 558; *Scorpion Sil. Min Co. v. Mordduo*, 10 Nev. 370. But in most statutory actions to quiet title, possession is essential. When the action is by a claimant of public land, if he is not in actual possession, he must show a full compliance with the local rules and customs of the district. *Prellus v. Jefferson & C. M. Co.*, 34 Cal. 558. "If, from the record, the defendant has a *prima facie* better paper title than the plaintiff and the latter has to resort to parol proof to establish his title, since he could not, therefore, in law recover possession, the equitable action, to quiet title, will lie." *Mason v. Black*, 87 Mo. 187.

<sup>2</sup> *Grubbs v. Bayard*, 2 Wall, Jr. (C. C.) 81; *DeWitt v. Morris*, 18 Wend. (N. Y.) 496; *Green v. Ashland Iron Co.*, 62 Pa. St. 97. But ore must be severed before action will lie. *Knowlton v. Culver*, 1 Chand. (Wis.) 85.

<sup>3</sup> See Statute of Frauds & Per. of different States.

<sup>4</sup> *Riddle v. Brown*, 20 Ala. 412, where a parol grant of a right to get ore was held to come within the statute.



But however this would be, the title to the minerals would pass immediately to the buyer, together with a license to remove the same, and for any injury to the owner's right of possession he could maintain replevin for possession of the mineral.<sup>1</sup>

§ 474. **How lessor may recover possession** — A lessor of a mine, like the owner of any other species of real property, may maintain an action of ejectment against his lessee to recover possession of his mining property and he can recover not only the possession of the mine, but all the rights and privileges incidental to the enjoyment of the mine, which in this particular remedy are deemed a part of the subject-matter of the action.<sup>2</sup> Where the lessor is successful in his action, he can generally recover damages for any ore that has been wrongfully taken from the mine by the lessee, and the measure of damage in such case would be the value of the ore before it had been removed from the soil, when the quantity removed is less than the amount of royalty per ton to be paid by the lessee, before the value of the ore has been increased by raising it to the surface.<sup>3</sup> But an action of ejectment will not lie against the licensee of a revocable license,<sup>4</sup> and the lessor cannot continue with an action of ejectment when he has committed any acts that

<sup>1</sup> *Table Mt. Co. v. Stranahan*, 20 Cal. 198; *Gatewood v. McLaughlin*, 23 *Id.* 178. Lessor can compel lessee to render accounting of the quantity of ore mined, when the royalty is payable upon the mineral removed. *Swearingen v. Steers* (W. Va. 1901), 38 S. E. 510.

<sup>2</sup> *Comyn v. Kyueto*, Cro. Jac. 150; *Cullen v. Rich*, Bull. N. P. 102; *Whittingham v. Andrews*, Carth. 277; *s. c.* 1 Salk. 255; *Crocker v. Fothergill*, 2 B. & Ald. 661.

<sup>3</sup> *Stockbridge Iron Company v. Cone Iron Works*, 102 Mass. 80.

<sup>4</sup> *Hanley v. Wood*, 2 B. & Ald. 739; *Beatty v. Gregory*, 17 Iowa, 109; *Shaw v. Wallace*, 1 Dutcher (N. J.), 453. Nor could a licensee, after breach of condition, maintain such an action or any action to recover possession. *Garvey v. Gunther*, 51 M. A. 545.

would amount to an acquiescence or assent to a continuance of the tenancy, for he is then held to have waived his right to terminate the tenancy, and under the doctrine of estoppel, if he had silently acquiesced, or tacitly consented to valuable expenditures by the lessee, an injunction would lie to restrain the lessor from prosecuting an action of ejectment for the recovery of the land.<sup>1</sup>

§ 475. **Same — Lessee cannot defend on verbal contract for new lease.** — After the expiration of the term for which a lease is given, the lessor is entitled to a surrender of the lease and delivery of the premises, and this right is not waived, at any time before a new lease is executed, merely by verbal promises or negotiations for a new lease, and the lessee cannot justify his holding over, after the expiration of his term, by such verbal contract, as the lessor, without denying such contract, would still be entitled to the possession.<sup>2</sup> But the lessor could waive the right to treat the tenancy as terminated and elect to regard the holding over as a renewal of the lease,<sup>3</sup> and any acts going to show an election, such as receipt of rent or royalty,<sup>4</sup> would be competent on the part of the lessees to establish a tenancy by estoppel or implication.<sup>5</sup>

§ 476. **Removal of fixtures.** — Before the expiration of his term, or within a reasonable time thereafter, the lessee may remove all improvements erected by him to carry on

<sup>1</sup> Big Mountain Imp. Co.'s App., 54 Penn St. 361.

<sup>2</sup> Grant v. White, 42 Mo. 285. The violation of a contract by parol for extension would give a cause of action for breach of contract, but could not justify a holding over. Tiefertunbrum v. Tiefertunbrum, 65 Mo. App. 254. Taylor's Land & Ten., § 338 (7 Ed.).

<sup>3</sup> Taylor's Land & Ten. (7 Ed.), § 22, p. 18.

<sup>4</sup> Ante, *idem*, § 23, p. 19; Strahan v. Smith, 4 Blng. 91.

<sup>5</sup> Taylor's Land & Ten. (7 Ed.), §§ 87, 507.

his mining operations, both in the way of buildings and machinery, even though annexed to the freehold,<sup>1</sup> and any interference with this right by the lessor, will enable the lessee to recover such improvements or their value.<sup>2</sup> But the improvements, to be the subject of removal by the tenant, must be susceptible of removal without destruction, or serious injury to the freehold;<sup>3</sup> the removal should be made before the expiration, or within a reasonable time after the expiration of the tenant's term,<sup>4</sup> and if the tenant renews the lease and continues in possession, without reservation of his right of removal of the fixtures previously annexed, he would be in the same position as if the lessor had demised him, both land and improvements, and on the termination of the renewed term cannot remove the improvements previously annexed by him.<sup>5</sup>

§ 477. **Prevention of waste by lessor.**—Where one, as tenant, has a limited right to be exercised in the land of

<sup>1</sup> *Heffner v. Lewis*, 73 Pa. St. 302; *Beauport v. Bates*, 3 De G. F. & J. 381; *Merritt v. Judd*, 14 Cal. 59; *Vorhis v. Freeman*, 2 Watts & S. (Pa.) 116; *Hayes v. N. Y. Min. Co.*, 2 Colo. 273; *Dudley v. Lord Ward, Ambler*, 118. See the leading case, by Story, J., of *Van Ness v. Packard*, 2 Pet. 137. "A steam-engine erected by the lessee of a salt-well for running the same is a trade fixture, is personal property, may be levied on by *fi. fa.*, goes to the executor, and is removable by the tenant though built into a stone wall." *Lemar v. Miles*, 4 Watts 330; M. M. D. 105.

<sup>2</sup> *Tay. Land. & Ten.* (7 Ed.), § 545, p. 478.

<sup>3</sup> *Tay. Land. & Ten.* (7 Ed.), § 550, p. 484. "Boilers fixed in a smelting works so that they could not be removed without destroying the building, pass as part of the realty, although the company which originally placed them there had no title to them." *Fryatt v. Sullivan Co.*, 5 Hill, 116; M. M. D. 105.

<sup>4</sup> *Thropp's App.*, 70 Pa. St. 396; *Gaffield v. Hapgood*, 17 Pick. 192; *Desloge v. Pearce*, 38 Mo. 598.

<sup>5</sup> *Watriss v. Bank*, 124 Mass. 571; *Laughran v. Ross*, 45 N. Y. 792; *Dingley v. Buffam*, 57 M. 381; *Taylor's Land. & Ten.* (7 Ed.), § 552, p. 487. This rule is a harsh one and would be abrogated in equity. *Ante, idem.*

another, an injunction will lie on behalf of the lessor to prevent an abuse of his privileges by the lessee.<sup>1</sup> And where one leases a mine and covenants to return the same at the end of his term in good condition, the lease would not constitute a bar to an injunction against pulling down the timber and removing the mineral immediately before the expiration of the term,<sup>2</sup> and an injunction and an account will be allowed against a trespass consisting in defendant's exceeding a limited right which he holds to take ore from the complainant's mine, for such a trespass goes to the destruction of the inheritance.<sup>3</sup> And so if the lessee, after having worked out a mine, proceeds to remove the pillars which had been left to support the roof of the mine, an injunction will be granted the lessor to restrain him from proceeding in such a manner as to cause the roof of the mine to cave in, and otherwise injuring the property of the lessor.<sup>4</sup> But an injunction will not be granted to the lessor to restrain his lessee from working a mine irregularly or so as not to appreciate the value of the lessor's estate;<sup>5</sup>

<sup>1</sup> *Purcell v. Nash*, 2 Jones, 116; *s. c.*, 1 Jones, 626; *Irwin v. Covode*, 24 Pa. St. 162; *Leavers v. Clearly*, 75 Ill. 349. "There has been for years an increasing disposition on the part of courts of equity to disregard the distinction between waste and trespass amounting to waste, and to restrain the latter as well as the former, by injunction." *Munson v. Tryon*, 6 Phila. 395 (1867); M. M. D. 150. "The right to an account in equity under a lease of mines is clearly settled." *Wright v. Pitt*, L. R., 12 Eq. 408; M. M. D. 200. This has been held true in the case of a tenant of a stone quarry. *Thomas v. Oakley*, 18 Ves. 184. To prevent tenant from removing mineral from a pool. *Thomas v. Jones*, 2 Y. & C. C. 510. And from removing valuable stones and clay used for making cement. *Earl Cowper v. Baker*, 17 Ves. 128.

<sup>2</sup> *Thomas Iron Co. v. Allentown Min. Co.*, 28 N. J. Eq. (1 Stew.) 77; *Lord's Ex. v. Carbon Iron Co.*, 38 L. J. Eq. 452.

<sup>3</sup> *Smith v. Rome*, 19 Ga. 89; *Norway v. Rowe*, 19 Ves. Jr. 144; *Purcell v. Nash*, 2 Jones, 116; *Irwin v. Covode*, 24 Pa. St. 162.

<sup>4</sup> *High on Inj.*, § 737; *Thomas Iron Co. v. Allentown Min. Co.*, 28 N. J. Eq. (1 Stew.) 77; *Lord's Ex. v. Carbon*, 38 L. J. Eq. 452.

<sup>5</sup> *Claverling v. Claverling*, 2 P. W. 388. A mine operator cannot be re-

and if the injunction is to restrain the defendant from proceeding beyond his boundaries, the court would refuse to interfere unless the evidence would remove the possibility of a doubt as to the existence and extent of such boundaries.<sup>1</sup>

§ 478. **Same — Breach of conditions — Removal of machinery.** — Where the lessee, under a lease of mining premises, covenants that he will use the premises for mining purposes alone, and that no other trade or business shall be conducted on the premises, an injunction will lie against the lessee,<sup>2</sup> or his sub-lessee,<sup>3</sup> in behalf of the lessor, to prevent any other use of the premises than those mentioned in the lease. It will also lie to prevent the lessee from removing machinery from the mine, which he has covenanted not to move.<sup>4</sup> And, generally, to prevent the breach of any other covenant, amounting to a permanent injury to the inheritance, whether the lessee's acts would amount to a nuisance or not.<sup>5</sup> But the mere failure to pay rent, under a lease, not containing a clause of forfeiture, is not sufficient ground to restrain a lessee from working the demised premises, for the lessee's acts thereunder are not illegal and the lessor must resort to some other legal remedy.<sup>6</sup> Nor

strained from blasting in the night time, because it affects the health and disturbs the sleep of the owner and diminishes the value of his estate. *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. (10 Sick.) 538; s. c. 14 Am. Rep. 322.

<sup>1</sup> *Davis v. Shepherd*, 35 L. J. Ch. 581; s. c. R. 1 Ch. App. 410.

<sup>2</sup> *Kemp v. Sober*, 1 Sim. (N. S.) 520; s. c. High on Injunctions, § 1144, p. 887.

<sup>3</sup> *Ante, idem.* *Clements v. Wells*, 1 L. R. Eq. 200.

<sup>4</sup> *Hamilton v. Dunford*, 6 Irish Ch. 412; High on Inj. 887, § 1144.

<sup>5</sup> *Stewart v. Winters*, 4 Sandf. Ch. 587; High on Inj., § 1145, p. 888.

<sup>6</sup> *Hell v. Strong*, 44 Pa. St. 264. But see as against tenant quarrying stone, *Purcell v. Nash*, 2 Jones, 116; s. c. 1 Jones, 626. As against life tenant exhausting mine, *Irwin v. Covode*, 24 Pa. St. 162. And see, after lease has expired, *Laird v. Boyle*, 2 Wis. 433.

would an injunction be granted against the lessee to compel the performance of a covenant, so harsh and inequitable that it would work a great hardship on the lessee to give it effect.<sup>1</sup>

<sup>1</sup> High on Inj., § 1146, p. 889; citing *Talbot v. Ford*, 18 Sim. 173.

## CHAPTER III.

### INJUNCTION TO RESTRAIN INJURIES TO MINING PROPERTY.

#### SECTION 479. Nature of the remedy.

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- 496. When account will be decreed.
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- 498. Same — Grounds for.

§ 479. Nature of the remedy. — An injunction is a judicial proceeding to compel the person against whom it is instituted to do or refrain from doing some particular act.<sup>1</sup> The application for an injunction should show some primary equity and the relief will not ordinarily be granted if the applicant's legal right or title is in doubt.<sup>2</sup> An

<sup>1</sup> Joyce on Injunctions, 1; Hillard on Injunctions, Ch. 1, § 1; Bisp. Prin. Eq. 899, and cases cited.

<sup>2</sup> Moore v. Ferrell, 1 Ga. 7; Irwin v. Davidson (N. C.), 3 Ired. Eq. 311. But the person in possession will always be entitled to an injunction against an adverse claimant, when his acts are injurious to the inheritance. Lowndes v. Bettle, 33 L. J. Ch. 451; Hess v. Winder, 34 Cal. 270; Munson v. Tyson, 6 Phila. 895.

injunction is not a corrective of past injuries, but before it will be granted, the applicant must show that he has received a substantial injury.<sup>1</sup> The right to an injunction is not *ex debito justicie*, but a right to be granted, in the sound discretion of the court, and according to the circumstances of each particular case.<sup>2</sup>

§ 480. *Jurisdiction of equity*. — A court of equity did not originally have jurisdiction to restrain trespasses to mines,<sup>3</sup> and the court was not justified in trying the title to the mines themselves.<sup>4</sup> For this reason the complainant was compelled to first establish his title at law, or show good and satisfactory reasons for his failure to do so.<sup>5</sup> But it is not necessary that the complainant's title should have been actually established by an action at law, in order to give a court of equity jurisdiction, for if he makes out a *prima facie* title and the same is not controverted by the defendant, he is entitled to an injunction to prevent trespasses likely to result in irreparable injury to his property.<sup>6</sup>

<sup>1</sup> *Jerome v. Ross*, 7 Johns. Ch. 315. But the removal of ore already extracted may be enjoined. *U. S. v. Parrott*, 1 McCall, C. C. 271. But injury must be irreparable. *Waldron v. Marsh*, 5 Cal. 119.

<sup>2</sup> *Bispham's Prin. of Eq.* 399 *et seq.*; *Atchison v. Peterson*, 20 Wall. 508; *Walt's Act. & Def.* (Vol. 4), p. 441 *et seq.*

<sup>3</sup> "This remedy was always attainable in action of waste; and it has been extended to trespasses in mining cases to prevent irreparable mischief." *Walt's Act & Def.*, Vol. IV., p. 441; *Gibson v. Smith*, Barn. Ch. 497; *Grey v. Duke Northumberland*, 18 Ves. 236; *Clowes v. Beck*, 20 L. J. C. C. 505; 18 Beav. 347.

<sup>4</sup> *Ante, idem.* Before the title is determined the court will proceed with caution. *Moore v. Terrell*, 1 Ga. 7; *Emma Mine Case*, 3 Leg. Gaz. 81.

<sup>5</sup> *Irwin v. Davidson*, 8 Ired. Eq. (N. Car.) 311. If the plaintiff's title is clear, however, no action at law is necessary. *West Point Iron Co. v. Reymert*, 45 N. Y. 708.

<sup>6</sup> *West Point Iron Co. v. Reymert*, *supra*; *Anderson v. Harvey*, 10 Gratt. (Va.) 386; *Lyon v. Woodman*, 3 Leg. Gaz. 81; *Hess v. Windor*, 34 Col. 270; *Munson v. Tyson*, 6 Phil. 395. *Flamang's case*, referred to by



§ 481. **Great latitude in case of mines.** — Greater latitude is allowed in the case of trespass to mining property than in restraining ordinary trespass to realty, for the mineral is the chief value of this species of property, and if the trespass were allowed to continue for a great length of time, it would greatly deteriorate the value of the property.<sup>1</sup> So if the trespass consists in a removal of ore from the complainant's mine, and he has an established legal title, he will be entitled to an injunction to restrain the removal of the ore, even though an action at law would lie.<sup>2</sup> And the fact, proved by the party enjoined, that the value of the ore taken could be readily estimated, does not deprive the court of its right to interfere in such a case by way of injunction,<sup>3</sup> for this could be shown in most cases

Lord Eldon, in *Hanson v. Gardner* (7 Ves. Jr. 304, at p. 307), is perhaps the first case where injunction was granted to restrain trespass in removal of mineral, as it is said: "Lord Thurlow hesitated much; but did at last grant the injunction; first, from the irreparable ruin of the property, as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining a trespass, where irreparable damage is the consequence." In *Grey v. Northumberland* (13 Ves. Jr. 236) and *Player v. Roberts* (2 Atk. 469), the distinction between enjoining the opening of a mine and stopping operations in one already going, was noted; it was stated that the court would be slow to grant the writ in the latter case. There is no distinction recognized, so far as injunctive relief is concerned, between mining and quarrying stone. *Thomas v. Oakley*, 18 Ves. Jr. 184; *Purcell v. Nash*, 2 Jones, 116.

<sup>1</sup> *McBrayer v. Hardin*, 7 Ired. Eq. (N. C.), 1; *Grey v. Duke of Northumberland*, 13 Ves. 236; *High on Inj.*, § 730, p. 559.

<sup>2</sup> *High on Inj.*, *supra*; *Merced Min. Co. v. Fremont*, 7 Cal. 317; *Scully v. Rose*, 61 Med. 408; *Silva v. Rankin*, 80 Ga. 79; *Hammond v. Winchester*, 82 Ala. 470; *Chambers v. Ala. Iron Co.*, 67 Ala. 353; *Lockwood v. Lunsford*, 56 Mo. 68; *Cheesman v. Shreve*, 37 Fed. Rep. 36.

<sup>3</sup> *Smith v. Pettingill*, 15 Verm. 84; *High on Inj.*, § 730 and note to page 559; *Jerome v. Ross*, 7 John. Ch. R. 315; 3 Daniel's Ch. Pr. 1631-1632; *Mitchell v. Dors*, 16 Ves. 174; *Thomas v. Cokley*, 18 Ves. 184. "The products of most mines have fixed value; yet it was to prevent trespass to this very species of property, mines of ore, coal, etc., that the relief in question had its origin." *Smith v. Pettingill*, *supra*; *High on Inj.* (note to 730).

of the kind and yet it was to prevent trespass and restrain waste and irreparable injury that the remedy of injunction had its origin and still continues to be most frequently used.<sup>1</sup> Minerals form a part of the *corpus* of the estate and aside from their intrinsic value, great and irreparable injury would result to the inheritance from their removal and it is principally for this reason that trespasses to mines are placed upon a different footing from trespass to other species of property, and the courts are always alert to interfere in such cases, to prevent the substance of the estate from being carried away and destroyed.<sup>2</sup>

<sup>1</sup> High on Inj., § 697, p. 536 *et seq.*; *Flamang's Case* (6 Ves. 174 and 7 Ves. 308), where defendant worked through complainant's close and extracted mineral, is perhaps the first case of trespass where the remedy was granted and the relief was based solely upon the irreparable injury to the estate. High, *supra*, and foot note; see also *Mitchell v. Dors*, 6 Ves. 174; *Gibson v. Smith*, Barn. Ch. 497; *Clawes v. Beck*, 13 Beav. 347; *Grey v. Northumberland*, *supra*. One cotenant alone may bring suit to prevent injury to common property. *Gilpin v. Sierra Nevada Con. Mining Co.*, 2 Idaho, 662. It is usually proper to make all parties defendant who contribute to the wrong. *Miller v. Highland Ditch Co.*, 87 Cal. 430; *Mining Debris Cases*, 8 Sawy. (U. S.) 628; *Cole Silver Min. Co. v. Vir. Water Co.*, 1 Sawy. (U. S.) 470. Court may dismiss bill for failure to bring in necessary parties. *Cole Silver Min. Co. v. Vir. Water Co.*, 1 Sawy. (U. S.) 485. Or may permit amendments bringing in such parties. *Ore Fin. Min. Co. v. Cullen*, 1 Idaho, 113. And bill will be dismissed for multifariousness for joining separate claims against different persons. *Keyes v. Little York Gold Washing Co.*, 53 Cal. 724; *Hamilton v. Whitridge*, 11 Md. 128. But see *Hillman v. Newington*, 57 Cal. 56, criticising *Keyes v. Gold Washing Co.*, *supra*.

<sup>2</sup> *McBrayer v. Hardin*, 7 Ired. Eq. (N. C.) 1; *Irwin v. Davidson*, 3 Ired. Eq. (N. C.) 311; High on Inj., § 730, and note, pp. 559-560; *Smith v. Pettingill*, 15 Ver. R. 84; *Jerome v. Ross*, 7 John. Ch. 315; *Anderson v. Harvey*, 10 Grat. 386; *Nichols v. Jones*, 19 Fed. Rep. 855. "The jurisdiction of a court of equity to restrain the destruction of the estate by mining, where a defendant is in adverse possession under claim of title, considered." *Haigh v. Jaggard*, 33 Eng. Ch. R. 231; 2 Coll. 231; *s. c.* on law side, 16 M. & W. 524; *Mor. Min. Dig.* p. 134. "The jurisdiction of chancery to restrain by injunction and to

§ 482. **Injury must be irreparable.** — Trespass to mining property was early recognized as one of the grounds for equitable jurisdiction by injunction, but cases of this character were distinguished from waste, and equity's jurisdiction was based principally upon the irreparable nature of the injuries in such cases, arising from the character of the property.<sup>1</sup> Hence, although it is not necessary for the complainant to establish his right at law, where the injuries are irreparable and liable to permanently injure the inheritance,<sup>2</sup> it is held to be a necessary allegation in his bill,<sup>3</sup> and if the injury is not irreparable in damages but is susceptible of pecuniary calculation and compensation by legal remedies, the court would refuse to interfere by injunction.<sup>4</sup>

compel an account in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass." *Thomas v. Oakley*, 18 Ves. Jr. 184; M. M. D. 184. As to a proceeding by the Federal Court, to restrain the assembling of miners, at the instance of a mine owner, on account of threatened injury to property and employees, see *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477. But although the acts asked to be restrained are committed before the writ issues, if there is grounds to apprehend a recurrence of the acts, the writ should go and be broad enough to restrain such acts in future. *Pa. Co. v. Bond*, 99 Ill. App. 535. For injunction against sinking shaft and removal of ore, see *Halpin v. McCune*, 107 Iowa, 494; 78 N. W. Rep. 210.

<sup>1</sup> *Flamang's Case*, 6 Ves. Jr. 147; 1 *Id.* 308 (perhaps the first case reported); *Livingston v. Livingston*, 6 Johns. Ch. 499; *Thomas v. Oakley*, 18 Ves. 184; *Munson v. Tyson*, 6 Phila. 395.

<sup>2</sup> *West Point Iron Co. v. Reymont*, 45 N. Y. 703.

<sup>3</sup> *Waldron v. Marsh*, 5 Cal. 119. And the facts showing the nature of the injury should be stated. *Supra*; *Leitham v. Cusick*, 1 Utah, 242.

<sup>4</sup> *Lyon v. Woodman*, 3 Leg. Gaz. 81; *Jerome v. Ross*, 7 Johns. Ch. 315. If there is reasonable ground to believe that the acts attempted to be restrained will not occur, the chancellor should refuse the writ. *Odlin v. Bingham Copper & Gold Min. Co. (N. J.)*, 51 Atl. Rep. 925. In all mining injuries, since the damage is not capable of being estimated, there can be no adequate remedy at law, and hence, insolvency is not material. *U. S. v. Parrott*, 7 Mor. Min. Rep. 335; *Merced Min. Co. v. Fremont*, 7 Cal. 317; 7 M. M. R. 313; *Smith v. Rome*, 19 Ga. 89; 7 M. M.

§ 483. **Applicant must generally show title.** — As a general rule an injunction will not be granted until the party aggrieved has shown a satisfactory title to the *locus in quo*;<sup>1</sup> but in a trespass to mining property, as the mischief, if allowed to continue, would soon be irreparable, an injunction will usually be granted temporarily, although the plaintiff's title may be in dispute and the same has never been established at law.<sup>2</sup> But when the defendants are also in possession of the property in controversy, if the title is doubtful and disputed and the plaintiff has not taken steps to establish the same, an injunction will usually be denied.<sup>3</sup> And if the jurisdiction of the court is put in issue, and the bill contains averments sufficient to give the court jurisdiction, it will award a temporary injunction to stay the injury until such issue can be determined.<sup>4</sup>

R. 306; *Anderson v. Harvey*, 10 Gratt. (Va.) 386; 7 M. M. R. 291; *McBayer v. Hardin*, 7 Ired. (N. C.) 1; 7 M. M. R. 288. But see *The Real Del Monte Gold and Silver Min. Co. v. The Pond G. & S. M. Co.*, 23 Cal. 82; 7 M. M. R. 452; *Lockwood v. Lunsford*, 56 Mo. 68; 7 M. M. R. 522. In injunction for waste, it is not sufficient to allege that defendant committed waste, but the facts should be set up showing the waste. *Capner v. Flemington Mining Co.*, 3 N. J. Eq. 467.

<sup>1</sup> *High on Inj.*, §§ 701-705-706; *Haigle v. Jagger*, 23 Eng. Ch. 231; 2 Coll. 231; *Irwin v. Davidson*, 3 Ired. Eq. (N. C.) 311; *Emma Mine Case*, 3 Leg. Gaz. 81. And where the title is in dispute, the injunction, if allowed, should only be temporary. *Echelkamp v. Schrader*, 45 Mo. 505; *Mayor v. Groschen*, 30 Md. 436.

<sup>2</sup> *U. S. v. Parrott*, 1 McAll C. C. 271; *Lyon v. Woodman*, 3 Leg. Gaz. 31; *Moore v. Terrell*, 1 Ga. 7; *Merced Min. Co. v. Fremont*, 7 Cal. 317.

<sup>3</sup> The court will not reinstate complainant in possession, as the legal remedy is ample. *High*, 715.

<sup>4</sup> *Irwin v. Davidson*, 3 Ired. Ch. (N. C.) 311. Pending ejectment, injunction should issue to protect mine, where damage would otherwise result. *Buskirk v. King*, 72 Fed. Rep. 22. And same is true of partition suit. *Rainey v. Fricke Coke Co.*, 73 Fed. Rep. 389. One who has never discovered mineral upon the public domain, cannot maintain injunction against an alleged trespasser. *Reagan v. Whittaker*, 14 S. D. 373; 85 N. W. Rep. 863. The old rule that where title was in dispute an injunc-

§ 484. **Where title is in dispute.** — An injunction will not ordinarily issue to restrain a trespass or other injury if the plaintiff's title is in dispute, but a determination of the legal controversy growing out of such dispute should first be settled,<sup>1</sup> but if the threatened injury is of such a nature that the consequences of its commission would be irreparable, should the title be decided adversely to the defendant, then equity will interfere to prevent the injury before a final adjudication as to plaintiff's title.<sup>2</sup> In this particular an exception exists as to the law of injunction, in its application for the protection of mines and mining rights, as distinguished from other classes of property, for on account of the irreparable nature of the injury to this class of property, resulting from its fluctuating values and the great resulting damage, both to corporeal as well as incorporeal holdings, from an interference with the owner's rights, it has generally been held that an injunction would issue for the protection of such property, although the plaintiff's title might be in dispute.<sup>3</sup> Some respectable authorities do not recognize this exception in the case of mines, but main-

tion would not issue has been modified by the later cases, in the case of injuries to mines, in order to preserve the property, pending the litigation, where there was no other adequate remedy. *Erhardt v. Boaro*, 118 U. S. 537; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hanson v. Gardner*, 7 Ves. Jr. 305, at p. 307. But see *Davis v. Lee*, 6 Ves. Jr. 788; *Old Tel. Min. Co. v. Central Smelting Co. (Utah)*, 7 Mor. Min. Rep. 556; *Magnet Min. Co. v. P. & P. Sil. Min. Co.*, 9 Nev. 346; *Lockwood v. Lunsford*, 56 Mo. 68. But see *U. S. v. Parrott*, 7 M. M. R. 335.

<sup>1</sup> *Waldron v. Marsh*, 5 Cal. 119; *Old Tel. Co. v. Cent. &c. Co.*, 1 Utah, 331; *Echelkamp v. Schroder*, 45 Mo. 505; 10 Am. & Eng. Encl. Law, p. 880.

<sup>2</sup> The court acts in such case to preserve the property pending the controversy. *Erhardt v. Boaro*, 118 U. S. 539; *Long v. Kosebeer*, 28 Kansas, 226.

<sup>3</sup> *Merced Min. Co. v. Fremont*, 7 Cal. 317; *McLaughlin v. Kelley*, 22 Cal. 211; *Chambers v. Ala. Iron Co.*, 67 Ala. 353; *Leiniger's App.*, 106 Pa. St. 398. See as to trespass where defendant is insolvent, etc. *Graham*

§ 485 INJUNCTION: INJURIES TO MINING PROPERTY. 641

tain that the plaintiff's title should be settled, except in extreme cases, before an interference by injunction.<sup>1</sup> However, the trend of the decisions seems to recognize the distinction in the case of mining properties, and rightfully so, for should the rule obtain that no relief by injunction can be had until an adjudication of title in a given case, then the rightful owner would constantly be subjected to repeated disputes of his ownership in all valuable properties, by the bold adventurers who frequent mining sections and at the end of the protracted litigation would only be rewarded by the possession of worthless property, a mine cut out, or ruined by unskillful or malicious working.<sup>2</sup>

§ 485. Same — When defendant is insolvent. — An injunction will be granted to restrain any illegal acts on the

*v. Dahlanego Gold Min Co.*, 71 Ga. 296; *McPike v. West*, 77 Mo. 199. To prevent flooding of mine. *Crampton v. Les*, 19 L. R. Eq. 115; *Hammond v. Winchester*, 82 Ala. 470; *Logan v. Driscoll*, 19 Cal. 628. But see *Clark v. Willett*, 85 Cal. 635.

<sup>1</sup> *Irwin v. Davidson*, 8 Ired. (N. Car.) Eq. 311; *Paris v. Blery*, 2 J. M. (Ky.) 483.

<sup>2</sup> *Lockwood v. Lunsford*, 56 Mo. 68; *Merced Min. Co. v. Tremont*, *supra*, and authorities cited. "The jurisdiction of a court of equity to restrain trespass in the case of the working of mines is fully established, whether the title be brought in issue or not; but where the title is denied, the court will look more closely into the character of the trespass." *Moore v. Ferrell*, 1 Ga. 7; M. M. D. 134. "An injunction to stay the working of a mine may be granted notwithstanding a question of title is involved. But the fact of title being involved will add to the caution of the court in granting it. It is not necessary for a plaintiff to establish his title by a suit at law where it is not doubtful and not in dispute. But if disputed and in doubt, a court of equity will not settle it for him. He must show a *prima facie* case, free from reasonable doubt, and a case free from the imputation of laches." *Emma Mine Case*, 3 Leg. Gaz. 81; M. M. D. 138. "To justify the interference of equity, the complainant must in general be in possession or have established his right at law, or brought an action to recover possession, or

part of either party to a suit, during the pendency of an action in which the title to property is in issue, until the trial and ownership of the property can be determined by the court.<sup>1</sup> And the action will lie, not only to restrain proceedings in the case of a disputed title at law, but it will also lie to prevent any unfair advantage being gained in a legal action in regard to the same property.<sup>2</sup> And more particularly is this true when the party guilty of the wrongful acts is insolvent, for in such case an action at law for damages would not afford adequate relief for the injured party.<sup>3</sup> Courts of equity would not, however, grant a perpetual injunction in a case where the title to the premises is put in issue, in order to restrain illegal acts on the part of one of the parties to the suit, if the evidence of the title is at all doubtful, but a temporary injunction would alone be granted to restrain the parties until the title to the property could be settled in law.<sup>4</sup> But the grounds for the injunction can alone depend upon the facts developed in the case before the court, and even in the case above mentioned, the court could hear further testi-

his exclusive right must be admitted by defendant, and the court will, in all such cases, proceed with great caution." *Bracken v. Preston*, 1 Pinney, 584; M. M. D. 142.

<sup>1</sup> *U. S. v. Parrott*, 1 McAll C. C. 271; *Lockwood v. Lunsford*, 56 Mo. 68. But see *N. J. Zinc Co. v. N. J. Tran. Co.*, 18 N. J. Ch. 328; *Old Tel. Min. Co. v. Cent. Smel. Co.*, 1 Utah, 331.

<sup>2</sup> *Charter Oak &c. Co. v. Cummings*, 90 Mo. 267; *High on Inj.* 357, p. 234; *Burke v. Parker*, 80 N. C. 157; *Goodenough v. Shepherd*, 28 Ill. 81; *Emma Mine Case*, 3 Leg. Gaz. 81.

<sup>3</sup> *Lockwood v. Lunsford*, 56 Mo. 68, a leading case. *Hamilton v. Ely*, 4 Gill. (Md.) 34. The insolvency of defendant when the title to premises is in dispute, is an important consideration. *Real Del Mont. G. & S. M. Co. v. Pond G. & S. M. Co.*, 23 Cal. 82.

<sup>4</sup> *Merced Min. Co. v. Fremont*, 7 Cal. 317. But where no proceedings are brought to establish title, and complainant's rights are doubtful, since the injunction could not be made perpetual, a temporary writ would be refused. *Old Tel. Min. Co. v. Cent. Smel. Co.*, 1 Utah, 331.

mony on the question of title, and as the remedy is wholly in the discretion of the chancellor, a perpetual injunction might be granted to more fully protect the interest of the plaintiff.<sup>1</sup>

§ 486. **Parol lease or license will not support action.** — A court will not ordinarily grant an application for an injunction when the complaint fails to show a good title to the land in controversy in the applicant and generally then only in a case of irreparable injury;<sup>2</sup> and when the complainant endeavors to restrain a trespass to mineral lands and has no other evidence of title than a mere parol lease or license, an injunction will not be allowed, for the proof in support of the complainants' title should be clear and satisfactory.<sup>3</sup> Damage should always be made to appear in

<sup>1</sup> *Lockwood v. Lunsford*, 56 Mo. 68, and cases cited; *U. S. v. Parrott*, 1 McAll C. C. 271; *McLaughlin v. Kelly*, 22 Cal. 211. But the court will not settle legal rights. *Irwin v. Davidson*, 8 Ired. Eq. (N. C.) 311. Owner of fee may enjoin commission of waste in life tenant. *Hughes v. Burriass*, 85 Mo. 660. But an injunction will not be granted to restrain the continuance of a trespass upon realty, if an adequate remedy at law may be had. *Boeckler v. Mo. Pac. Ry. Co.*, 10 M. A. 448. As to chancellor's discretion see *Capner v. Flemington Min. Co.*, 2 Green's Ch. 467. In *De Carvajal v. Y. M. C. A. Ass'n of N. Y.*, the court refused a temporary injunction asked by adjoining landowner because of threatened injury to building, from blasting, as it did not appear that defendants were insolvent and hence, plaintiff had an adequate remedy at law. 76 N. Y. S. 474; 3 Misc. Rep. 727. If there is an adequate remedy at law, injunction should be refused. *Gardner v. Stroeve*, 81 Cal. 150; *Wilson v. Mineral Point*, 39 Wis. 160; *White v. Stender*, 24 W. Va. 615; *Colton v. Price*, 50 Ala. 424; *Welgle v. Walsh*, 45 Mo. 560; 10 Enc. Pl. & Pr. 953.

<sup>2</sup> *Emina Mine Case*, 8 Leg. Gaz. 81. But see *West Point Iron Co. v. Reymert*, 45 N. Y. 708; *Hess v. Winder*, 34 Cal. 270; *Munson v. Tyson*, 6 Phil. 395.

<sup>3</sup> *Clegg v. Jones*, 43 Wis. 482; *High on Inj.* 731. Nor could a licensee enjoin a subsequent lessee of the same mineral unless his license was exclusive of the right to mine the ore. *Carr v. Benson*, L. R. 3 Ch. App. 524. But see, as between old and junior licensees, *Anderson v. Simpson*, 21 Iowa, 399.



the application for an injunction and as the licensee would not be damaged by an injury to the land, except so far as money damages would compensate him, he is confined to his legal remedy alone for redress.<sup>1</sup> But although it is the general rule, that relief by injunction will not be granted unless a judgment at law has been obtained, establishing plaintiff's title,<sup>2</sup> in the case of encroachments upon the land of an adjoining mine owner, or of excavations and other trespasses on his land, an injunction may be granted although a verdict at law has not been rendered for the same trespass.<sup>3</sup>

§ 487. **Fraud a ground for relief.** — Fraud is one of the fundamental grounds for equity's interference,<sup>4</sup> and any misrepresentation on the part of a purchaser of mines or mineral property will constitute sufficient grounds for grant-

<sup>1</sup> Before severance he is not even regarded as having any property in the minerals. Balnb. on Mines, p. 300; *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81; *Chitwood v. Zinc Co.*, 93 Mo. App. 225; *Rochester v. Min. Co.*, 86 Mo. App. 447.

<sup>2</sup> *Stevens v. Williams*, 5 Mor. Min. Rep. 449. This is the general rule, unless some special ground for relief exists. *Smith v. Jameson*, 91 Mo. 13; *Irwin v. Davidson*, *supra*. But see, *contra*, *N. J. Zinc & Iron Co. v. Trotter*, 38 N. J. Eq. 3.

<sup>3</sup> *Lockwood v. Lunsford*, 56 Mo. 68; *Mitchell v. Dors*, 6 Ves. Jr. 147; *N. J. v. Parrott*, *supra*; *Lyon v. Woodman* (Pa.), 3 Leg. Gaz. 81. "Injunction against a trespasser to prevent his taking ore ought to issue in favor of a party in possession under a clear title without requiring him to bring any action at law." *Anderson v. Harvey*, 10 Gratt. (Va.) 386; Mor. Min. Dig., p. 135. "A licensee cannot enjoin a subsequent lessee of the same minerals, the license not being exclusive, and defendant not interfering with the actual possession of the licensee." *Carr v. Benson*, L. R. 8 Ch. App. 524; Mor. Min. Dig. 139. For injunction to restrain removal of ore by licensee, after revocation of mining license, see *Lockwood v. Lunsford*, 56 Mo. 68; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426. For full discussion of the rights and remedies of a licensee to mine, see chapter, *License to Mine*.

<sup>4</sup> High on Injunctions, 21-47-190-208.

ing relief by injunction.<sup>1</sup> For instance, it has been held, that where a judgment creditor takes from his debtor a conveyance of his land in satisfaction of the judgment, and a third party, with full knowledge of the facts, fraudulently obtains from the judgment debtor a conveyance of the mineral or ore beneath the land, such person could be enjoined from subsequently removing the mineral so purchased, upon the well established jurisdiction of a court of equity in transactions tainted with fraud.<sup>2</sup>

§ 488. **In favor of surface owner.** — The surface owner of land has an easement for subjacent support in the soil beneath the same, and is entitled to an injunction to restrain the party owning the ore or mineral beneath the surface, from removing the same in such a manner as to injure the property of the surface owner.<sup>3</sup> But where

<sup>1</sup> High on Inj., § 1559; *Wood v. Rowcliffe*, 3 Har. 304.

<sup>2</sup> *Outcalt v. Disborough*, 2 Green Ch. 214, and see also High on Inj. 861. Injunction will lie to prevent an adjoining landowner from using undue means to cause natural gas or oil to flow from his neighbor's land on to his own. *Manfg. Gas & Oil Co. v. Ind. Nat. Gas & Oil Co.* (Ind. 1900), 57 N. E. 912. But adjoining lessee cannot be enjoined because his pump draws the oil from the plaintiff's land. *Jones v. Forest Oil Co.*, 194 Pa. St. 379; 44 Atl. Rep. 1074. "Where a complaint sought for a rescission of deed, and an injunction, etc., upon the ground that the defendants had agreed to pay cash upon receiving the deed, and to that end gave a sight draft, and that it had not been paid, and the drawers were insolvent, and the indorser admitted these allegations, and sought to avoid them by other matter: *Alid*, that as there was an equity confessed, the injunction should be continued." *Carter v. Hoke*, 64 N. C. 348; *Mor. Min. Dig.*, p. 126.

<sup>3</sup> *Rogers v. Taylor*, 2 Hurl. & U. 828. And in every demise of minerals by the surface owner, it is a presumption of law that he reserves the right to support. *Dugdale v. Robertson*, 8 Kay & J. 695. And the usual clause that the mine owner shall do as little damage as possible to the soil does not operate to defeat the right of support. *Proud v. Bates*, 34 L. J. Ch. 406; s. c. 39 Eng. L. & Eq. 19. See also *Hext v. Gill*, L. R. 7 Ch. 699. Also High on Inj. (Vol. 1), p. 563, and cases cited.

there is a reservation in a conveyance of real property of all the mines and minerals beneath the surface of the land, together with a covenant to compensate the grantee, for any damage that may be occasioned in digging for the mineral and taking it away, the grantor will be allowed to take the mineral from under the land so conveyed, and the surface owner would be confined to his legal remedy, and could not prevent him from so doing by injunction.<sup>1</sup>

§ 489. *Same — Where minerals are reserved.* — If the owner of land conveys the same and reserves to himself the minerals beneath the surface, with or without the right to extract the same reserved, the ownership of the ore would carry with it the right to mine, but he would not be permitted to take it from the ground if he could not get it without leaving sufficient support to the surface, for the right to subjacent support is incidental to the ownership of the surface, just as essentially as his right of possession is to the ownership of the ore.<sup>2</sup> And generally, in the absence of express words limiting or waiving his right, the legal presumption is that the surface owner retains the surface with the natural support it possessed before the demise.<sup>3</sup>

<sup>1</sup> *Aspden v. Seddon*, L. R. 10 Ch. 394; *High on Inj.* 736. Nor would the mine owner be liable for the loss of a spring occasioned by working the mine. *Coleman v. Chadwick*, 80 Pa. St. 81. But the right of support is distinct from any right to compensation, claimed under the terms of a grant or exception of mines, and any such stipulation will not defeat the right to support, unless it is expressly included. *Harris v. Ridding*, 5 M. & W. 60; s. c. 8 L. J. (N. S.) Exch. 181; *Wakefield v. Duke of Buccleugh*, L. R. 4 Eq. 618; s. c. 4 H. L. Cas. 377; *Marvin v. Brewster Iron Co.*, 55 N. Y. (10 Sick.), 538; s. c. 14 Amer. Rep. 322. Injunction will lie, to restrain removal of minerals that will let surface subside. *C. & A. R. R. Co. v. Brandau*, 81 Mo. App. 1.

<sup>2</sup> *Harris & Ryding*, 5 M. & W. 60. And when injury results the question of negligence is not material. *Brown v. Robins*, 4 H. & M. 186.

<sup>3</sup> *Dugdale v. Robertson*, 3 Kay & J. 695; *Richards v. Jenkins*, 18 Law Times (N. S.) 438; *Smart v. Morton*, 3 Eng. L. & E. 385; *Coleman v. Chad-*

However, the right of surface support may be divested by grant from surface owner to the owner of the minerals, and if the surface owner has expressly waived or qualified his right, he would not be entitled to protection in equity, for a subsequent injury to the surface, and his grantee would take the surface subject to the rights of the mineral owner and the previous limitations placed upon the rights of the surface owner by his grant.<sup>1</sup>

§ 490. **Protection of right to lateral support.** — A landowner has the right, independent of prescription, to the lateral support of his neighbor's land, so far as the same is necessary for sustaining his own soil in its natural state, and for excavations causing a withdrawal of such support, he is entitled to compensation for the injury resulting to the land, and also for whatever damage is caused to the buildings erected thereon.<sup>2</sup> And a court of equity will restrain the adjoining landowner from excavating or removing the soil

wick, 80 Pa. St. 81; *Humphreys v. Bragden*, 12 Q. B. 789; *s. c.* 1 Eng. L. & E. 241. "And for liability of lessee for acts of his subtenant, see *Berkly v. Shafto*, 15 C. B. (N. S.) 79; *Bainb.* 488; *Williams v. Gibson*, 84 Ala. 228.

<sup>1</sup> *Smith v. Darby*, L. R. 7 Q. B. 716; *Buchanan v. Andrew*, L. R. 2 S. C. App. 286; 5 Moak, 125; *Scranton v. Phillipps*, 94 Pa. St. 15; *Williams v. Bagnal*, 12 Jur. (N. S.) 987. And it is asserted by Mr. Bainbridge that any permanent injury to surface is justifiable, if necessary to the enjoyment of the right to mine. *Bainb. on Mines*, 21. But the authorities do not extend the rights of the mineral owner so far, and the surface owner in such case is entitled to compensation. *Bain.* 486; *Hodgson v. Moulson*, 18 C. B. (N. S.) 882; *Gilmore v. Driscoll*, 122 Mass. 199; *Wood on Nuisances*, 185; cases cited, 184-190; *Wakefield v. Buccleugh*, L. R. 4 Eq. 624; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464; *Martin v. Brewster I. Co.*, 55 N. Y. 538; 14 Am. R. 322. And a custom justifying such injury is not a good defense. *Horner v. Watson*, 79 Pa. St. 242.

<sup>2</sup> *Hunt v. Peake*, 1 Johnson (Eng.), 705; *Farrand v. Marshall*, 21 Barb. 409. But see *Ryckman v. Gillis* (57 N. Y. 68), where a reservation of the right to take clay was enforced, although causing adjacent land to cave.

from his land, if the effect of such excavation will be to cause the land of his neighbor, by reason of the removal of his lateral support, to fall or subside.<sup>1</sup> But the lateral support to which an owner of land is entitled only extends to such adjacent land as would be sufficient to afford the necessary support in its natural and undisturbed State, and in granting relief under such circumstances, equity is confined to those cases where the complainant has not himself, by buildings or otherwise, increased the lateral pressure upon the adjoining soil,<sup>2</sup> for if he has erected buildings upon the margin of his own land, as he would himself be regarded at fault, he would not be entitled to an injunction.<sup>3</sup> But where the buildings erected by the complainant were injured by the mine operations of the adjoining landowner, and his operations would have caused the land to subside, without the additional weight of the buildings, the court held complainant was entitled to a perpetual injunction and for compensation,<sup>4</sup> and although the mine operator is not generally liable for injuries to buildings erected subsequent to the acquisition of his right to mine,<sup>5</sup> where the working of the mine was the real cause for the subsidence of the adjacent land, the owner can recover for

<sup>1</sup> The rule as to lateral support is the same as in case of ordinary adjoining land. *Bainbridge on Mines*, 499; *Lord v. Larbon Iron Mfg. Co.*, 38 N. J. Eq. 452; *Richards v. Jenkins*, 18 L. T. Rep. (N. S.) 438; *Gilmore v. Driscoll*, 122 Mass. 199; s. c. 23 Am. Rep. 312; *Hunt v. Peake*, *supra*.

<sup>2</sup> *Farrand v. Marshall*, 21 Barb. 409; 19 *Id.* 380; *Birmingham v. Allen*, L. R. 6 Ch. Div. 284.

<sup>3</sup> *Hunt v. Peake*, 1 *Johnson (Eng.)*, 705; *Partridge v. Scott*, 3 M. & W. 220; *McGuire v. Grant*, 1 *Dutch. (N. J.)* 356; *Rogers v. Taylor*, 2 H. & N. 828.

<sup>4</sup> *Jeffries v. Williams*, 5 Ex. 792; *Rogers v. Taylor*, *supra*; *Homer v. Knowles*, 6 H. & N. 454; *Hunt v. Peake*, 1 *Johnson (Eng.)*, 705.

<sup>5</sup> *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; s. c. 3 E. E. 752; 6 El. & Bl. 593.

damage to buildings thereon, if he was not himself negligent in the erection of such buildings,<sup>1</sup> and the erection of buildings subsequent to the vesting of the right to mine would not vary the rights of the parties.<sup>2</sup>

§ 491. **As to claim on public land — "Placer mines."**— The principle upon which the courts grant relief in case of trespass to mining property applies to occupants of claims upon the public land and can be resorted to either by the States or general government to protect the public land from injuries of the class called trespasses.<sup>3</sup> Equity's relief by injunction is particularly applicable to the kind of mining known as "placer mines," and on account of the irreparable injury that would result from the continuance of a trespass to this character of property, it would seem that the courts should exercise still greater latitude in trespasses to such property.<sup>4</sup> The ore in a placer mine consists generally of small auriferous deposits which could be easily worked out and removed without leaving the slightest evidence of their value, upon which to base an accounting. For this reason the courts should be, and generally are, more alert to enjoin encroachments and

<sup>1</sup> *Homer v. Knowles*, 6 H. & W. 454; *Hunt v. Peake*, 1 Johnson (Eng.) 705. And where the conveyance of the minerals contemplates a future erection by the surface owner of certain buildings thereon which he covenants not to put to certain uses, this was held, by implication, a sufficient reservation of the right of support for the buildings afterward erected. *Berkley v. Shafto*, 15 C. B. (N. S.) 79.

<sup>2</sup> *Marvin v. Brewster Iron Co.*, *supra*; *Rowbotham v. Wilson*, 8 H. L. Cas. 348.

<sup>3</sup> *United States v. Gear*, 8 How. (U. S.) 133, 120; *Cotton v. U. S.*, 11 How. (U. S.) 229; *U. S. v. Cortillera*, 2 Black, 1; *U. S. v. Parrott*, 1 McAll (U. S.) 271; *s. c. McAll* (U. S.) 447; 15 Am. & Eng. Enc. of Law, 514.

<sup>4</sup> *High on Inj.*, 735, p. 562; *Chapman v. Toy Long*, 4 Sawyer, 28. And see, as to rights of patentee to excavating ditches and injury by flooding soil, *Henshaw v. Clark*, 14 Cal. 160.

trespasses upon such mines, whenever the complainant shows himself entitled to possess the mines under general law, or some local rule or custom, and has also the right to appropriate the ore therein.<sup>1</sup>

§ 492. **For diverting water course.** — The necessity of the conditions of miners upon the public land, has led to a recognition of their right, both by Congress and by local rules and customs, to the use of the waters of running streams for mining purposes,<sup>2</sup> and an injunction would not lie to restrain the defendant from using the waters of a stream for mining purposes, unless the plaintiff had acquired prior right to use the waters of such stream, and the defendant was guilty of such an unreasonable use of the water as to render the plaintiff unable to exercise his rights in and concerning the same.<sup>3</sup> But it is frequently

<sup>1</sup> Wade's Am. Min. Laws, p. 234, § 158. *Chapman v. Toy Long*, 4 Saw, 28, where defendants, being aliens, were enjoined from working a placer claim, although they had prior possession to complainant, for the reason that they were not qualified to locate the claim. High on Inj., § 735, p. 562. "Where plaintiffs alleged ownership of a lode claim, and prayed an injunction to restrain defendants working, and the defendants' answer not only denied plaintiffs' allegations, but stated that the plaintiffs were working the lode and property of the defendants: *Held*, that under the practice act of Utah, the court had power to enjoin the plaintiffs from working." *Smith v. Richardson*, 1 Utah, 245; M. M. D., p. 150.

<sup>2</sup> *Basey v. Gallagher*, 20 Wall. 670; *Wait's Act. & Def.*, Vol. IV, p. 442; *McKnight v. Ratcliff*, 44 Pa. St. 156; *Clark v. Willett*, 35 Cal. 534; *Stone v. Bumpus*, 46 Cal. 218; *Esmond v. Chew*, 15 Cal. 137; *Smith v. Kenrick*, 7 C. B. 505; *Fletcher v. Rylands*, 3 Hurl. & Colt. 173.

<sup>3</sup> *Ante, idem.* *Atchison v. Peterson*, 1 Mon. T. 561; *Locust Mountain Coal Co. v. Garrell*, 9 Phil. (Penn.) 247; *Fletcher v. Smith*, L. R. 2 App. Cas. (H. L.) 781; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Tillotson v. Smith*, 32 N. H. 90. "A person appropriating and diverting the water of a stream at a given point, cannot afterwards change the point of diversion to the prejudice of a subsequent locator." *Butte T. M. Co. v. Morgan*, 19 Cal. 609; M. M. D. 406. "No equitable remedy can be had

necessary, where mining is carried on at any great depth, to have a stream of water running through the mine or tunnel to be used for mining purposes, and if the complainants are entitled to have a stream running through their tunnel, and the defendant diverts the stream from plaintiff's drift, or tunnel, by constructing and excavating his own beneath the same, an injunction will lie on behalf of the plaintiff to prevent the defendant from so doing, providing the plaintiff can show a good title to the land in controversy, and the water is not shown to come from the land of the defendant.<sup>1</sup>

§ 493. **Flowing of refuse matter.** — An injunction will lie in behalf of a prior occupant of a mining claim to restrain adjoining mine owners from draining the refuse matter from their mines over such occupant's claim, or to protect the occupant of a mining claim against the refuse coming down from a claim on a higher location than his own.<sup>2</sup> And it would seem an injunction will be granted

for a mere past diversion of a water course; but when the injury is continuing, relief may appropriately be sought in equity." *Tuolumne W. Co. v. Chapman*, 8 Cal. 392; M. M. D. 140.

<sup>1</sup> *Fletcher v. Smith*, L. R. 2 App. Cas. (H. L.) 781. A mine owner has no right to be an active agent in sending water into a lower mine. *Baird v. Williamson*, 15 C. B. (N. S.) 376. And in Pennsylvania it is said he must use reasonable diligence to prevent the flow of water from his mine into the lower one. *Locust Moun. Coal Co. v. Garrell*, 9 Phil. (Penn.) 247. In case of a contested water right, where the granting of a temporary injunction would work less harm than its refusal, it should be granted. *Copper King v. Wabash Mining Co.* (1902), 114 Fed. Rep. 991. One appropriating water after it passed from a placer mine, and before it passed from the premises to the creek, held to acquire rights of a licensee only, and not entitled to enjoin its pollution. *Fairplay Hydraulic Mining Co. v. Weston* (Colo.), 67 Pac. Rep. 160.

<sup>2</sup> *Logan v. Driscoll*, 19 Cal. 623. And it will also lie to prevent injury by water from another mine. See *Duke of Beaufort v. Morris*, 6



even before the drain had been actually constructed across the complainant's land, if the defendant had taken preliminary steps to accomplish such purpose, for if an injury is thereby threatened, it is not necessary that it should actually have been committed, to warrant a court to interfere.<sup>1</sup> But the granting of the injunction in such case depends upon the character and extent of the injury alleged, whether it be irremedial in its nature, whether an action at law would afford an adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.<sup>2</sup>

Hare, 340; *Thomas v. Jones*, 2 Y. C. C. C. 510; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Lewis v. Stein*, 16 Ala. 214; *Gerrish v. Brown*, 51 Me. 256.

<sup>1</sup> *High on Inj.*, 18, 655; *McArthur v. Kelly*, 5 Ohio, 189; *Gibson v. Smith*, 2 Atk. 182. But insolvency alone is not sufficient ground for relief. *Heilman v. Union C. Co.*, 37 Pa. St. 100; *High on Inj.*, p. 17, § 18.

<sup>2</sup> *Atchison v. Peterson*, 20 Wall. 508; *Walt Act. & Def.*, Vol. IV., p. 441. A mine owner has a right to throw refuse from his mine into a natural stream, and the right may be asserted by prescription, or by custom. *Corlyan v. Lovering*, 26 L. J. Exch. 251; *s. c.* 1 Hurl. & N. 784. A private nuisance may be legalized by continued user for twenty years. *Wright v. Williams*, 1 M. & W. 77. But the prior locators of mining land, have no right, by custom or otherwise, to allow tailings to run free in the gulch and render valueless the claims of subsequent locators below them. *Lincoln v. Rodgers*, 1 Mont. 217; *Nelson v. O'Neal*, *Id.* 284. When license is no defense to flowing of refuse matter, see *Miser v. O'Shea*, 37 Oreg. 231; 62 Pac. Rep. 491. Where a subsequent appropriator discharges refuse and tailings in water, to the damage of a lower and prior claimant, it will not avoid an injunction that operations were carefully conducted. *Carson v. Hays* (Oreg.), 65 Pac. Rep. 814. The construction of a dam to prevent flow of tailings will not be enjoined. *Nelson v. O'Neal*, 1 Mont. 284. It is no defense to prevent injunction for flowing of refuse matter, that it is but the result of the proper conduct of mining operations. *Beach v. Sterling Zinc Co.*, 54 N. J. Eq. 65. But see *Penn. Coal Co. v. Sanderson*, 118 Pa. St. 126; *Carson v. Hays* (Oregon, 1901), 65 Pac. Rep. 814.

§ 494. **Working through into another mine.** — If one mine owner, or other person operating a mine, in digging mineral upon his own land, drifts through into the ground of another, in addition to the legal action *quare clausum fregit* and to recover the value of the mineral taken, the wrong-doer could also be enjoined from further proceedings.<sup>1</sup> And if one, having worked through into another's mine and removed mineral therefrom, should refuse to let the owner inspect the mine, for the purpose of ascertaining the extent of the injury done, a mandatory injunction would lie to compel the defendant to permit the complainant to inspect the mine for this purpose.<sup>2</sup> Where the defendant in his answer admits the entry and working of the mine in question, but denies the complainant's title to the same, on satisfactory proof, a perpetual injunction should be awarded the complainant.<sup>3</sup> And an injunction *pendente lite* should be granted in such a case to restrain the defendant from working his mine in such manner as to endanger that of the complainants, until the latter, in case his title is unsettled, can bring an action at law to establish the same.<sup>4</sup>

<sup>1</sup> Lockwood v. Lunsford, 56 Mo. 68; Mitchell v. Dors, 6 Ves. Jr. 147; High on Inj. 734; Horner v. Watson, 79 Pa. St. 242; 21 Am. Rep. 55.

<sup>2</sup> *Ante, idem.* Thomas Iron Co. v. Allentown Min. Co., 28 N. J. Eq. (1 Stew.) 77; High on Inj., § 737, p. 563.

<sup>3</sup> McLaughlin v. Kelly, 22 Cal. 211; High on Inj. 733. But when the equities are denied injunction should be dissolved, unless proper proof is offered. 23 Cal. 82; 22 *Id.* 479; 13 *Id.* 156.

<sup>4</sup> Lockwood v. Lunsford, 56 Mo. 68; Merced Min. Co. v. Fremont, 7 Cal. 317; Grey v. Northumberland, 13 Ves. Jr. 236; *s. c.* 17 *Id.* 281. And when the averment of plaintiff's right is met by demurrer, there is no occasion to first establish his title at law, as the same is admitted by the demurrer. Toulane W. Co. v. Chapman, 8 Cal. 392. But equity is loath to restrain the working of mines before the complainant's title has been established at law. N. J. Zinc Co. v. N. J. Franklinite Co., 14 N. J. Ch. 308; Boston Franklinite Co. v. N. J. Zinc Co., 13 N. J. Eq. 323. "It has long been settled that where a mere trespasser digs into and

§ 495. **To restrain removal of ore.** — Where the trespass consists in a removal of ore from another's mine, an injunction will not only prevent the recurrence of future trespasses, but it will also restrain the removal of ore already extracted from the mine.<sup>1</sup> But if the defendant has remained in possession for a considerable length of time, and expended large sums of money in developing the mine, an injunction will not ordinarily be granted without a consideration of his rights.<sup>2</sup> Nor would an injunction be granted a complainant who had allowed the defendant to expend large sums of money in preparations for mining, without previously having warned him or objected to such expenditures,<sup>3</sup> and if the injured party has already sued at

works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent." *Lockwood v. Lunsford*, 56 Mo. 68. But an injunction to restrain trespass to mining property will not lie for one act of trespass. *Parker v. Furlong* (Oreg. 1900), 62 Pac. Rep. 490. In *Mitchell v. Dors* (6 Ves. Jr. 147), the defendant, who commenced to take coal in his own land, and worked through into that of his landlord, was enjoined. The court will restrain the use of a coal shaft, to win mineral from adjoining mines. *Leavers v. Cleary*, 75 Ill. 349. And so will the cutting of an air shaft, through plaintiff's mine, by an adjoining mine owner, be restrained. *Powell v. Alken*, 4 Kay & J. 348. On injunction to restrain wrongful working of mineral by adjoining owner, found in possession of a vein of ore and working it, upon plaintiff's land, the burden is on defendant to show title to such vein. *Maloney v. King* (Mont.), 64 Pac. Rep. 851. See also *Butte Co. Min. Co. v. Mont. Ore Purch. Co.* (Mont. 1901), 63 Pac. Rep. 825; *Muldrick v. Brown* (Oreg. 1901), 61 Pac. Rep. 428.

<sup>1</sup> *United States v. Parrott*, 1 McAll C. C. 271. But see *Hamilton v. Ely*, 4 Gill (Md.) 34. For sufficiency of bill see *Hooper v. Dora Coal Min. Co.* (Ala.), 10 Southern Rep. 652; *Coosaw Min. Co. v. State*, 12 S. Ct. 689; 44 U. S. 550. A bill will lie on behalf of a State or the U. S. to prevent removal of ore from public land, and the trespasser may be held criminally liable if there is a penal statute for such a trespass. *U. S. v. Parrott*, *supra*; *U. S. v. Gear*, 3 How. 132.

<sup>2</sup> *Parrott v. Palmer*, 8 M. & K. 632; *Mexborough v. Bower*, 7 Beav. 127; *Big Company's App.*, 54 Pa. St. 86.

<sup>3</sup> *Parrott v. Palmer*, *supra*; *Real Del Monte G. S. & S. M. Co. v. Pond*

law for the trespass, before his application for equitable relief, although the trespass may still be continuing, and the wrong-doer intending to remove the ore, still equity would refuse to interfere by injunction, unless the injury was irreparable.<sup>1</sup> However, the removal of ore goes to the destruction of the estate,<sup>2</sup> and if the court, in its discretion — and the right of the court to interfere by injunction is purely discretionary<sup>3</sup> — sees fit to restrain the working and removal of ore, the fact that the value of the ore taken could easily be computed, would not deprive the court of its jurisdiction and its right to prevent such removal by injunction.<sup>4</sup>

§ 496. **When account will be decreed.** — It is a fundamental rule of equity practice that when the court once entertains jurisdiction it will proceed and adjust the rights of the parties, in order to prevent a multiplicity of suits. The right to compel an accounting is therefore incidental to the court's jurisdiction in relief by injunction against waste

*G. & S. M. Co.*, 23 Cal. 82. As to cotenant's right to restrain cotenant from using common property for individual benefit, see *Butte & Co. v. Mont. Ore-Purch. Co.*, 21 Mont. 539; *Harrigan v. Lynch*, 21 Mont. 36; 52 Pac. Rep. 642.

<sup>1</sup> *Hamilton v. Ely*, 4 Gill. (Md.) 34; *West Point Iron Co. v. Reynert*, 45 N. Y. 708; *Jerome v. Ross*, 7 Johns. Ch. 315.

<sup>2</sup> *Merced Min. Co. v. Fremont*, 7 Cal. 317; *Thomas v. Oakley*, 18 Ves. Jr. 184.

<sup>3</sup> *Capner v. Flemington Min. Co.*, 2 Greene's Ch. 467; *Lyon v. Woodman*, 3 Leg. Gaz. 81.

<sup>4</sup> *Anderson v. Harvey*, 10 Gratt. 386. "The removal of ore already extracted may be enjoined as well as the further extraction of it." *U. S. v. Parrott*, 1 McAll C. C. 271; *M. M. D.* 135. But where plaintiff has stood by and beheld the expense of opening a mine, without objection, he is estopped to enjoin the subsequent operations. *Big Mt. Co.'s App.*, 54 Pa. St. 361; *Parrott v. Palmer*, 3 M. & K. 632; *Mexborough v. Bower*, 7 Beav. 127; *Real Del Monte Co. v. Pond Gold and Silver Min. Co.*, 23 Cal. 82; 7 M. M. R. 452.

and trespass,<sup>1</sup> and when the plaintiff has the title to the premises, it will, in general, decree an account for the waste already committed and restrain the commission of future waste by injunction.<sup>2</sup> And in the case of injuries to mines, even though the court should refuse to grant an injunction, it may still decree an account, because of the irreparable nature of the injury and the damage to complainant by withholding an account.<sup>3</sup> The great damage to the inheritance, as well as the incalculable pecuniary loss which would result from a wrongful working of mines and the removal of the ore, is the reason why the courts draw an exception in the case of injuries to mines and go to the extent of decreeing an account, although an injunction may be refused.<sup>4</sup> But where the complainants only seek to enjoin the operation of a mine by a cotenant, without asking for additional relief, the court will not entertain jurisdiction for the purpose of decreeing an account, but if there are other suits pending between the same parties the court could decree an accounting in order to adjust the rights of the parties and prevent a multiplicity of suits.<sup>5</sup> The same defense

<sup>1</sup> *Ackerman v. Van Houten*, 4 Halst. N. J. Ch. 476; *Parrott v. Palmer*, 8 Myl. & K. 632; *High*, 670.

<sup>2</sup> *Fleming v. Collins' Admr.*, 2 Del. Ch. 230; *High on Inj.* 671, p. 519.

<sup>3</sup> *Parrott v. Palmer*, *supra*; *High on Inj.* 670; *Winchester v. Knight*, 1 P. Wm. 406; *Story v. Windsor*, 2 Atk. 630; *Poulteney v. Warren*, 6 Ves. Jr. 89. Where joint owners of a tunnel exclude one of the owners, injunction will lie to restrain such exclusion. *People v. Dist. Ct. Lake Co.*, 27 Colo. 465; 62 Pac. Rep. 206.

<sup>4</sup> *Allison's App.*, 77 Pa. St. 221; *Parrott v. Palmer*, *supra*; *High on Inj.*, § 670, p. 517.

<sup>5</sup> *Stuart v. White*, 25 Gratt. (Va.) 300; *Mitchell v. McAll*, 25 Gratt. (Va.) 300; *s. c. Morrison's Min. Dig.*, § 150, p. 147. "Defendants' well having struck oil before the hearing, which, from its situation, decreased the flow of complainants' well, an accounting was had, based upon the yield of the respective wells: *Held*, that the jurisdiction of the court extended beyond the writ of injunction, and a decree for the damages was ordered." *Allison & Evan's Appeal*, 77 Pa. St. 221; *M. M. D.* 444.

which defeats the injunction, however, may preclude the complainant from an accounting. If the plaintiff's right to an injunction has been barred by laches, this may also be ground for refusing an account,<sup>1</sup> and the injunction and account would both be refused, unless the complainant is in possession and has the right to maintain an action for mesne profits against the defendant, for without this right existing in himself his bill would state no equity.<sup>2</sup>

§ 497. **Injunctions against corporations.** — In all cases where the acts of a corporation are liable to result in irreparable injury to another, whether such person is a stockholder or one in no way interested in the corporation, an injunction is the proper remedy to prevent the corporation from abusing the powers conferred by its charter.<sup>3</sup> Corporations are under the same police regulations as natural persons, in respect to the use of their property and the exercise of their powers and the same rules of law govern in this as in other actions against them.<sup>4</sup> When an injunction is served against a corporation it binds all the officers and agents of the company who have knowledge of the same, and if the president of the corporation, on whom an injunction has been served, conceals the fact of such service from the other officers of the company, he will be liable for a breach of the injunction on his part, if they ignorantly perform acts in violation of the order of the court.<sup>5</sup>

<sup>1</sup> High on Inj., § 670, p. 517; Parrott v. Palmer, 3 Myl. & K. 632; s. c. Mor. Min. Dig. 149, p. 147.

<sup>2</sup> Brocker v. Preston, 1 Pinney, 584.

<sup>3</sup> Boone on Cor. 149; High on Inj. § 1200; Big Mt. Imp. Co.'s App., 54 Pa. St. 361.

<sup>4</sup> High on Inj., *supra*; Boone on Cor., *supra*.

<sup>5</sup> Golden Gate H. L. M. Co. v. Superior Court, 65 Cal. 187; Boone on Cor., *supra*; People v. Albany & V. R. Co., 12 Ab. Pr. 171. And a court has power to punish a corporation, like an individual, for contempt.

§ 498. **Same — Grounds for.** — It is useless to attempt to enumerate nearly all of the grounds for an injunction against mining corporations, as the adjudged cases in the reports of the different States furnish much better data on specific cases; the remedy, however, is most frequently resorted to to prevent an appropriation of the corporate property for the purposes unauthorized by the by-laws of the company;<sup>1</sup> to restrain the corporation from constructing works not needed by the corporate business;<sup>2</sup> to restrain the officers of the corporation from transferring the corporate assets beyond the limits of the State where it was organized,<sup>3</sup> and to quell disputes arising between different members of the company, which would prevent a proper administration of the corporate affairs.<sup>4</sup> And in addition to the grounds above mentioned, the remedy can be resorted to by third parties to restrain injuries to their property rights, in all cases where the same injury would justify a similar remedy against a natural person.<sup>5</sup> But an injunction would not be granted where there was a plain and adequate remedy at law<sup>6</sup> and the application must at all times be made without

High on Inj., § 1460, p. 1127. An injunction against a corporation binds not only the corporation, but all of its officers and agents. *Golden Gate Hyd. Mining Co. v. Superior Ct.*, 65 Cal. 187; *Mexican Ore Co. v. Mex. Guadalupe Mining Co.*, 47 Fed. Rep. 854. But see, where plaintiff's misconduct will excuse defendant for violation of writ, *Van Zandt v. Argentine Mining Co.*, 2 McCreary (U. S.), 642; *Mowrer v. State*, 107 Ind. 539; 10 Enc. Pl. & Pr. 1104.

<sup>1</sup> *Binney's Case*, 2 Bland, 99; *Boone on Cor.*, § 149; *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268.

<sup>2</sup> *Newark P. R. Co. v. Elmer*, 1 Stockt. 754.

<sup>3</sup> *Matthews v. Trustees &c.*, 7 Phill. 270; *Boone on Cor.* 149.

<sup>4</sup> *Featherstone v. Cooke*, Law R. 16 Eq. 298; *Johnston v. Jones*, 8 Greene C. E. 216; *Boone on Cor.*, *supra*.

<sup>5</sup> *Richmond &c. Co. v. Richmond*, 26 Gratt. 83.

<sup>6</sup> *Howe v. Rochester &c. Co.*, 66 Barb. 592; *Brown v. Concord*, 56 N. H. 375; *Boone Cor.*, § 149; *Chesapeake Ry. Co. v. Babbett*, 5 Wash. (Vt.) 138.

undue delay. It will not generally be granted against the governing body of a corporation unless it appear that all means of compulsion, in the power of the corporation, have been resorted to in vain, and where the mischief that the injunction is intended to prevent has already been accomplished by the corporation, the injunction would of course be refused.<sup>1</sup>

<sup>1</sup> Boone on Cor., § 149, p. 221; *Foss v. Horbottel*, 2 Hare, 461; *Mosley v. Alston*, 1 Phil. Ch. 790.



## CHAPTER IV.

### ACTION FOR WASTE.

**SECTION 499. History of the action.**

- 500. By and against whom maintainable.
- 501. Same — Against representative of lessee.
- 502. What acts constitute waste.
- 503. Same — In respect to mineral deposits.
- 504. Right of lessee at common law.
- 505. Same — Wrong consists in opening soil.
- 506. Same — What considered "new mine."
- 507. Right presumed in tenant to open mines.
- 508. Same — How right affected by abandonment of mine.
- 509. Exemption from liability for waste.
- 510. Waste by licensee — Action on the case.
- 511. Joinder of plaintiffs under the code.
- 512. When equity will interfere.

§ 499. **History of the action.** — In early times waste could only be committed in respect to estates of dower and curtesy, the reason obtaining that as they were the only estates created by law, the law should, in such estates, provide for the protection of the inheritance.<sup>1</sup> Subsequently the action was extended by statute to all kinds of estates for life,<sup>2</sup> and for years, and by the statute of Gloucester the party committing the waste was chargeable with a penalty of treble damages, together with a forfeiture of his estate.<sup>3</sup> A judgment could be recovered for treble the actual damage committed at common law, and the land upon which the waste was committed was forfeited to the reversioner.<sup>4</sup>

<sup>1</sup> Tiedeman's Real Property, § 72, p. 49, where a full exposition of the early doctrine is had.

<sup>2</sup> See Statute of Marlbridge, cited *supra*.

<sup>3</sup> 1 Washburn on R. P., §§ 139-140; Tiedeman R. P., *supra*.

<sup>4</sup> Parrott v. Barney, Deady, 405, holding this statute to be part of the common law of the United States.

Where the waste had been already committed, the party was liable in an action at law for damages, and where the waste was only threatened, an injunction would be granted to restrain the commission of the unlawful acts, or to prevent its repetition in the future.<sup>1</sup> But the common law technical action of waste for treble damages, could only be maintained by the tenant of an estate of inheritance, immediately succeeding the particular estate,<sup>2</sup> and the interposition of a freehold estate in remainder would take away this action,<sup>3</sup> although the common law action on the case, in the nature of waste, could be maintained by any one who had a reversionary interest in the land and had been injured therein.<sup>4</sup>

§ 500. **By and against whom maintained.**—By the code the common law action of waste has been abolished and a civil action substituted therefor, under which judgment is recoverable for the forfeiture of the thing wasted and damages for treble the amount at which the waste is assessed.<sup>5</sup> The action, under the code, can be maintained

<sup>1</sup> See Chap. on *Injunction*; *Gibson v. Smith*, 2 Atk. 182; *Caldwell v. Baylis*, 2 Mer. 408.

<sup>2</sup> *Tiedeman R. P.*, § 81, p. 57; Co. Lit. 218b, note, 122; *Williams v. Bolton*, 3 P. Wms. 268; *Bacon v. Smith*, 1 Q. B. 345.

<sup>3</sup> *Tiedeman R. P.*, *supra*; *Hunt v. Hall*, 37 N. Y. 363; *Peterson v. Clark*, 15 Johns. 205-206.

<sup>4</sup> *Williams v. Bolton*, *supra*. See, for rule in code States as to this distinction, *Brown v. Bridges*, 30 Iowa, 145. The common-law writ of waste was abolished in England by Statute 3 and 4 Wm. IV., c. 27, and is superseded in most of the United States by the action of trespass on the case, in the nature of waste. 22 Enc. Pl. & Pr., p. 1101, 1102; *Rogers v. Coal River Co.*, 41 W. Va. 596; *Bollenbacher v. Frits*, 98 Ind. 52; *Stevens v. Rose*, 69 Mich. 259. A statute authorizing waste does not affect the common law right of action for waste. *Thackeray v. Eldigan* (R. I.), 44 Atl. Rep. 689; *Cecil v. Clark* (W. Va.), 35 S. E. Rep. 11; *Id.* 39 S. E. 202.

<sup>5</sup> Statutes different States; R. S. Mo. 1899, § 4146.

by one who has the remainder or reversion in fee simple, after an intervening estate for life or years, and also by one who has a remainder or reversion for life or years only.<sup>1</sup> The action can be maintained by tenants in common, tenants of a joint tenancy, and by parceners against their cotenants, and in every case the party entitled to the action can recover such damages as it appears he has suffered from the act complained of.<sup>2</sup> But the provisions of the code, giving the reversioner or remainderman the right to maintain the action, notwithstanding any intervening estate for life or years, authorizes only waste against a tenant and trespass against a stranger to the possession; it does not authorize the action of waste against a third party.<sup>3</sup>

<sup>1</sup> Bliss on Code Pleading, 30, and cases cited. "Digging lead ore from the lead mines upon the public lands is such waste as entitles the United States to an injunction." *U. S. v. Gear*, 8 How. 132; M. M. D. 135. "It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds." *Job v. Patton*, L. R. 20 Eq. 84; M. M. D. 206. "Charge of waste in mining against tenant for life must be made affirmatively to appear; the presumption is in favor of the tenant for life." *Lynn's Appeal*, 31 Pa. St. 44; M. M. D. 400. Waste can only be maintained by the holder of the legal title. *Gillett v. Treganza et al.*, 13 Wis. 472; s. c. 7 Mor. Min. Rep. 432. In action of waste against life tenant, the remainder man must not only prove the acts of waste, but that such acts injured the inheritance. *Morris v. Knight*, 14 Pa. Super. Ct. 324. And where the acts were cutting timber, tenant may show trees were dying. *Idem*. The action can, generally, be maintained by any one owning a reversionary estate in the premises, against the tortious tenant. *Howard v. Patrick*, 38 Mich. 795; *Thompson v. Manhattan Co.*, 130 N. Y. 360; 22 Enc. Pl. & Pr. 1104. A purchaser at sheriff sale cannot recover for acts of waste by the former owner. *Baker v. Johnson* (Del.) 42 Atl. Rep. 449; *O'Connor v. Bank*, 116 Ala. 585; 22 So. Rep. 902. A mortgagor in possession, working a mine, is liable for the waste committed. *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467.

<sup>2</sup> R. S. Mo., 1899, *supra*; and Statutes different States.

<sup>3</sup> *Taylor's L. & T.*, note, § 698; *Cole et al. v. Han. & St. J. Ry. Co.*, 60 Mo. 227.

§ 501. **Same — Against representative of lessee.**— The common law action of waste was considered a tortious action which died with the person of the tenant and although the executor and administrator of a tenant for years can be held liable for waste committed by themselves, while in possession of the land, they cannot be charged for waste committed by a testator in his lifetime, for the reason that the action does not survive the person of the tenant.<sup>1</sup> During his own lifetime, however, every lessee is liable for waste committed on the leased premises, whether committed by the tenant or not, if he is in possession of the premises, under the lease, at the time the waste is committed.<sup>2</sup> Statutes have been passed in most of the code States, however, providing for a remedy in case of the death of the tenant of the particular estate,<sup>3</sup> and under such statutes, any person, or his personal representatives, may maintain the action of trespass against the executor or administrator of any testator, or intestate, who during his life committed any act of trespass or conversion, either in regard to the real or personal estate of such person.<sup>4</sup> But when treble damages are imposed by the statute against persons committing waste, such damages can only be recovered against the person actually committing the waste.<sup>5</sup>

<sup>1</sup> "But the Sta. 8 Edw. III., Chap. 8, having always been in force in this country, may so far be treated as the common law," and according to this statute every kind of injury to personal property gives a right of action, which survives to the personal representative. Bliss on Code Pleading, § 39.

<sup>2</sup> Taylor's Land & Ten., § 689, p. 282. And he is responsible even for the acts of a third party. *Supra*.

<sup>3</sup> Statutes and codes of different States; Bliss on Code Pleading, § 40.

<sup>4</sup> Bliss on Code Pleading, §§ 40-41, and cases cited.

<sup>5</sup> Taylor's Land. & Ten. 689.

§ 502. **What acts constitute waste.** — It is impossible to lay down any fixed rule to determine in each particular case whether certain acts would constitute waste or not. Every case must be determined according to the facts and circumstances peculiar to that given case, and the usages or customs of the community or mining district, enter very largely into the settlement of the question.<sup>1</sup> Under certain circumstances many things would be injurious, which, at other times and places, or under other conditions, might be really beneficial to the premises.<sup>2</sup> A familiar illustration is the cutting of timber on land leased for mining purposes. In some localities the lessee would be limited strictly to what was necessary for these purposes, and he could be held liable for waste if he exceeded what was reasonably necessary.<sup>3</sup> In another section of the country where the timber was plentiful, it would be beneficial to the inheritance to have the wood removed, and there it would not be considered waste in the lessee to remove such timber from the land, even though he should cut more than was reasonably necessary for his mining operations.<sup>4</sup> But, although the removal of the timber might be beneficial to

<sup>1</sup> *McCoy v. Walt*, 51 Barb. 225; *Bond v. Lockwood*, 33 Ill. 212; *Drown v. Smith*, 52 Me. 141. Whether the particular acts amount to waste is a question of fact for the jury. B. & W. L. C., p. 319.

<sup>2</sup> *Ante*, *idem*. *Tiedeman R. P.* 78 *et sub.*; *Moyle v. Moyle*, 6 Wen. 66; *s. c.* B. & W. L. C. 319. Working through into another's land is trespass, and not waste. *Mitchell v. Dore*, 6 Ves. 174; B. & W. L. C., *supra*.

<sup>3</sup> *Tiedeman R. P.*, § 74, p. 51; *Drown v. Smith*, 52 Me. 141; *Keeler v. Eastman*, 11 Vt. 293; *McGregor v. Brown*, 10 N. Y. 118.

<sup>4</sup> *McCullough v. Irwine*, 13 Pa. St. 438; *Harder v. Harder*, 20 Barb. 414; *Morehouse v. Cobhead*, 22 N. J. Eq. 521; *Crockett v. Crockett*, 2 Ohio St. 180. "The law of waste must be accommodated to the circumstances of a new and unsettled country." (Virginia, 1818.) *Findley v. Smith*, 6 Munf. 134; M. M. D. 400. It is an act of waste to work unopened mines and quarries. *Bainbridge* (1 Am. Ed.), 39; *Bond v. Lockwood*, 33 Ill. 212; *Shaw v. Wallace*, 25 N. J. L. 453; *Crouch v. Puryear* (Va.), 10 Am. Dec. 528.

the premises, the lessee would not have the right to sell the same, unless such a course was customary in the community, for this right belongs strictly to the owner of the land.<sup>1</sup> Generally speaking, any act which results injuriously to the inheritance, would be considered waste, and especially would this be the case when the land was used for purposes other than those for which the same was leased.<sup>2</sup> A resulting damage to the reversioner must always be shown, however, and whether or not a particular act would be considered waste, is always a question of fact for the jury to determine.<sup>3</sup>

§ 503. Same — In respect to mineral deposits. — As before explained, any act which would be considered injurious to the inheritance and which was not in accordance with the purposes for which the land was leased, would be considered waste.<sup>4</sup> This rule applies as well to the lessee

<sup>1</sup> *Chase v. Hazelton*, 7 N. H. 171; *Clemence v. Steere*, 1 R. I. 272; *Parkins v. Coxe*, 2 Hayw. 339; *Tiedeman* R. P. 74, p. 52.

<sup>2</sup> 2 Bl. Com. 281; *Moyle v. Moyle*, Owen, 66; B. & W. L. C. 319, and cases cited.

<sup>3</sup> *Taylor's Land. & Ten.* 346-689, and cases cited; 1 Washb. R. P. 108-109; *Gallagher v. Shipley*, 24 Md. 418; *Jackson v. Brownson*, 7 Johns. 227; B. & W. L. C. 319. If one tenant in common take coal from the common property, without accounting therefor, this will constitute waste. *Cecil v. Clark* (W. Va.), 35 S. E. Rep. 11. And so as to timber. *State v. 4 Jud. Dist.*, 52 La. Ann. 103; 26 So. Rep. 769; *Nevels v. Ky. & C.*, 56 S. W. 969; 49 L. R. A. 416. Or quarrying rock. *Griff v. Dewey*, 164 N. Y. 1; 58 N. E. Rep. 1. If a lessee commit an act which alters the nature of the premises, it is waste. *West Ham. Cent. Bd. v. Waterworks Co.*, 69 L. J. Ch. 257; 1 Ch. (1900), 624. Drilling for oil by a lessee, under a lease by a life tenant, is waste. *Kenton Gas Co. v. Dorney*, 17 Ohio C. C. 101. A mortgagee in possession is not liable for waste who only cuts timber necessary for firewood and to repair buildings on the premises. *Chase v. Driver*, 92 Fed. Rep. 780. Sale of large quantities of growing timber by a life tenant is waste. *Smith v. Smith*, 105 Ga. 106; *Davis v. Clark*, 40 Mo. App. 515.

<sup>4</sup> 1 Wash. R. P. 108, 109, and authorities cited, *supra*.

who enters under a mining lease and willfully or negligently causes injury to the inheritance, as it does to any other lessee who is guilty of a similar act.<sup>1</sup> The act of mining itself would be considered waste, and the opening of new mines, or making excavations in search of ore, would be considered waste, unless the right to do so is expressly granted by the owner of the land.<sup>2</sup> And where the right to mine is not expressly given the lessee, as where he enters under the lease for other than mining purposes, he will not be permitted to dig or sell any of the mineral deposits found upon the land, or to convert the same to his own use, unless his action in this regard had been previously ratified by the owner of the land or his course established by the custom of the community.<sup>3</sup> If, however, it had been the custom of previous owners to make such a use of the land, or if his acts were warranted by the custom of the community, such a lessee could not be charged with waste by converting mineral deposits found in the land to his own use.<sup>4</sup> But even though his acts were justified by the custom of former owners, he would only be allowed to use such mines or pits as were already open at the time of his entry, and if he should open new ones for the purpose of obtaining mineral he would still be liable for waste.<sup>5</sup> But a lessee

<sup>1</sup> And an act by one of two joint lessees amounting to waste would be waste by both. *Greene v. Cole*, 2 Wms. Saund. 259b.

<sup>2</sup> Tiedeman on R. P., p. 52, § 75, and note; 2 Bl. Com. 281; *Saunders' Case*, 5 Rep. 12; *Stoughton v. Liegh*, 1 Taunt. 410; *Irwin v. Covode*, 24 Pa. St. 162; *Owings v. Emery*, 6 Gill. 260; 8 M. M. R. 337.

<sup>3</sup> *Moyle v. Moyle*, Owen, 66; *Knight v. Mosley*, Amb. 176; *Neele v. Neele*, 19 Pa. St. 324; *Kier v. Peterson*, 41 Id. 361; *Crouch v. Puryear*, 1 Rand. 258; *Billings v. Taylor*, 10 Pick. 460; *Lenfers v. Henke*, 73 Ill. 405; *Hendrix v. Macbeth*, 61 Ind. 473.

<sup>4</sup> *Whitfield v. Bewit*, 2 P. Wms. 240; Co. Litt. 37a, 54b; *Bac. Abr. Waste*, 8; B. & W. L. C. 318.

<sup>5</sup> Tiedeman R. P., § 75 and cases; *Owings v. Emery*, 6 Gill. 260; *Taylor's Land. & Ten.*, § 346, p. 405; B. & W. L. C., *supra*.

who enters for the purpose of conducting mining operations can exercise, in regard to the demised premises, any privileges which are reasonably necessary for carrying out his mining operations. He can follow the same vein for this purpose and can make new shafts, roadways, and such other improvements as are necessary for the handling of the ore, and so long as he conducts his operations in a reasonable and workmanlike manner, he cannot be held liable for waste.<sup>1</sup>

§ 504. **Right of lessee at common law.** — At common law the lessee of land containing stones or minerals and precious metals, although he did not have the right to open new mines, unless he entered with a grant for this purpose, or to sell the ore to the public, had a perfect right to use so much of the mineral as he found necessary for his own use, and such reasonable use of the same would not subject him to an action of waste.<sup>2</sup> The tenant, for instance, could dig for gravel or clay, to be used by him in the reparation of the house, or could take such other mineral as he found necessary for his own immediate use for these or similar purposes, and in so doing he would not subject himself to an action for waste.<sup>3</sup> But if he took an unreasonable quantity of mineral, or mined and excavated the same for purposes of sale to the public, and not for his own private use,<sup>4</sup> or if he even broke the soil and removed

<sup>1</sup> *Clavering v. Clavering*, 2 P. Wms. 388; *Billings v. Taylor*, 10 Pick. 460; *Tiedeman R. P.*, *supra*; *Lynn's App.*, 31 Pa. St. 45; *Kier v. Peterson*, 41 *Id.* 361; *Irwin v. Covode*, 24 *Id.* 162; *Crouch v. Puryear*, 1 Rand. 258.

<sup>2</sup> *Mitchell v. Dare*, 6 Ves. 147; *Hanson v. Gardner*, 7 *Id.* 305b; *B. & W. L. C.* 319; *Crouch v. Puryear*, 1 Rand. 258; *Moyle v. Moyle*, *Owen*, 66.

<sup>3</sup> See *Co. Litt.* 57; *B. & W. L. C.* 318; also *Whitefield v. Bewit*, 2 P. Wms. 240.

<sup>4</sup> *Moyle v. Moyle*, *supra*; *Blanchard & Weeks Ltd. Cas.* 319; *Mitchell v. Dare*, 6 Ves. 147; *Hanson v. Gardner*, 7 Ves. 305b.



the ore for other than such reasonable purposes, or without a previous authority from the owner, as the ore is a part of the corpus of the land, a removal thereof would tend to the destruction of the estate and subject the lessee to an action for waste.<sup>1</sup>

§ 505. **Same — Wrong consists in opening soil.**— The gist of the offense of waste is the wrongful unauthorized penetration and opening of the soil, in the first instance, by the lessee or those under him.<sup>2</sup> It could not be predicated against a lessee, in under a mining lease, where he is given the right to mine and sink shafts by the lease and take the produce from the mines, for here it is the evident intention that he should have the right to break the soil and mine as a necessary incident to his tenancy;<sup>3</sup> nor could the tenant be considered guilty of waste where he simply continued to mine pits and shafts already opened at the commencement of his tenancy, for, in such case, the minerals would be a part of the annual profit of the land.<sup>4</sup> But where a tenant, without the express right to mine, enters upon the premises and opens new mines, or, having the right to mine such mines as are open only, proceeds to develop and open new ones, he would thereby render himself liable for waste to the owner of the land, for, being an act tending to the destruction of the inheritance, it could

<sup>1</sup> *Whitfield v. Bewit*, 2 P. Wms. 240; Co. Litt. 54b, 17 E. 3, 7, 9-11, *et sub.*; 2 Rolls. Abr. Waste, 816; *Crouch v. Puryear*, 1 Rand. 258.

<sup>2</sup> *Taylor's Land. & Ten.*, § 346, p. 405; *Coke Littleton*, 54b, 57; *B. & W. L. C.* 318; *Owings v. Emery*, 6 Gill. 260.

<sup>3</sup> *Crouch v. Puryear*; *s. c. B. & W. L. C.* 319; 1 Rand. 258; *Moyle v. Moyle, Owen*, 66.

<sup>4</sup> Co. Litt.; *Moyle v. Moyle*, *supra*; *Taylor's Land & Ten.* 346, p. 405. *et sub.*; *Westmoreland Co.'s App.* 10 M. M. R. 222. As to dowress' right to mine, see *Crouch v. Puryear*, 15 M. M. R. 118. And as to right of lessee to quarry stone, see *Elias v. Snowden Slate Co.*, 15 M. M. R. 143.

only be rightfully committed under authority from the owner thereof.<sup>1</sup>

§ 506. **Same — What considered “new mine.”**— Although it would seem a very easy matter, at first blush, to determine what should be considered a “new mine,” the decisions on the subject have given rise to some conflict as to how the term should be understood.<sup>2</sup> The difficulty of the courts to reconcile the different decisions has apparently arisen from a failure to properly distinguish between a mine and a vein or seam, and in theory the proper solution would be to consider all operations in the old opening or continuations thereof, whether upon the same or different seams, as work upon the old mine and the development of new seams by new openings as new mines, and some of the cases have adopted a rule similar to this.<sup>3</sup> The early English cases, however, lay down a different rule from this and recognize in the tenant, as the right to follow the “opened mines,” the privilege of making new shafts and pits to reach the same vein, instead of being compelled to pursue the vein entirely underground from the old opening.<sup>4</sup> This would seem to be giving the term,

<sup>1</sup> See Co. Litt., 54b, where Lord Coke observes: “If a man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mine) for life or for years; the lessee of such mines as were open at the time of the lease made may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time the lease was made, for that is waste;” *s. c.* Blanchard & Weeks Ld. Cas., p. 318. A life tenant is not subject to impeachment for waste for removal of oil or mineral, either where the settlement authorizes such removal or the mines are open. *In re Chayter's Set.* (Eng. 1900), 69 L. J. Ch. 837; 2 Ch. 804.

<sup>2</sup> Blanchard & Weeks Ld. Cas., p. 321; *Mor. Min. Dig.*, p. 236, § 35.

<sup>3</sup> *Spencer v. Scurr*, 31 Beav. 334; *s. c.* 32 L. J. Ch. 122; *B. & W. L. C.* 321.

<sup>4</sup> *Clavering v. Clavering*, *Mac. Sel. Cas.* 221; *s. c.* 2 P. Wms. 388; *B. & W. L. C.* 321; *Eq. Ca.*, *Abl.* 589; *Mosely*, 219.

“old opening,” an interpretation exactly the contrary to the plain significance and meaning of the language used, and such a one as to almost abrogate the rule that gave rise to the distinction, which the term was intended to perpetuate, but like many of our modern case law precedents, the ancient jurists who promulgated this subtle opinion, bolstered it up by most worthy logic and reasoning, and only arrived at the conclusion, “on great consideration and much consulting.”<sup>1</sup>

§ 507. **Right presumed in tenant to open mines.**—The law presumes a grant to the tenant of the right to open new mines and in the absence of proof to the contrary the court would find from this presumption that the mines were open at the commencement of the tenant's term, or that he had the right to open them, as the charge of waste could not be sustained without affirmative proof of the acts.<sup>2</sup> But it does not follow from the fact that the courts would presume the right to open new mines on the part of the tenant that he would have such right in the face of actual proof of a want of such grant, and where the presumption is overcome by actual proof to the contrary, the right presumptively recognized would necessarily fall with the presumption.<sup>3</sup>

<sup>1</sup> *Clavering v. Clavering*, *supra*. The apology by the court in this case was in the above language of the text. See also *Findley v. Smith*, 6 Mund. (Va.) 184.

<sup>2</sup> *Lynn's Appeal*, 81 Pa. St. 44. And see as to presumption in connection with meaning of the term “new mine,” *Spencer v. Scurr*, 81 Beav. 334, also B. & W. L. C. 321.

<sup>3</sup> *Astray v. Ballard*, 2 Mod. 193; *Reed v. Reed*, 1 C. E. Green, N. J. Eq. 248; B. & W. L. C. 320. And see for proof of acts overcoming the presumption of a grant, *Bartlett v. Phillips*, 4 De G. & J. 414. A lease or license is matter of defense and need not be negatived by plaintiff. *Rogers v. Coal River Co.*, 41 W. Va. 593; *Davis v. Clark*, 40 Mo. App. 515; 22 Enc. Pl. & Pr. 1111.

§ 508. **Same — How right affected by abandonment of mine.** — As before explained, it is the settled rule of the common law that a tenant of mining ground has the undoubted right to continue mining operations in mines already opened at the commencement of his tenancy and to take the proceeds therefrom, as a part of the profits of the land. The question now under discussion is the effect that abandonment or the length of time that the mine was idle would have upon this right, and a full understanding of the matter necessarily depends upon a clear conception of the distinction between opened and unopened mines as affecting the tenant's rights. A mine not idle for a period over a year or two before the tenant's possession would perhaps still be considered an open mine,<sup>1</sup> but one not worked for a hundred years, or such great period, would not be an open mine,<sup>2</sup> although the fact of a cesser of work for a shorter period, on account of the loss of profit, would not necessarily render the tenant liable in an action of waste, for a resumption of work at such a time as the ore could be profitably handled.<sup>3</sup> From the above rule it will be seen that the tenant's rights and his resulting liability are made to depend, in a great measure, upon the period during which the mine was not worked as a circumstance showing its previous abandonment. As a matter of fact time is a very small circumstance in the proof of any abandonment, as the question depends rather upon the *intention* of the last owner. As this would be a capricious something on which to hinge the rights of the tenant in such cases, however, the impractica-

<sup>1</sup> *Bagot v. Bagot*; 2. c. B. & W. L. C. 322.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> *Legge v. Legge*, 32 Beav. 509; *Baggott v. Baggott*, *supra*; *Blanchard & Weeks* Ld. Cas. 322.

bility of adopting it is perhaps the reason for the above rule by the courts.<sup>1</sup>

§ 509. **Exemption from liability for waste.**—It is quite frequent, in demises of land, for mining purposes, for the lessor or reversioner by grant, to exempt the lessee from liability for waste. Where there is such a provision in the instrument of demise, the lessee is then said to hold his estate “without impeachment for waste.”<sup>2</sup> He can do many acts which would be denied such a lessee when not exempt from this liability, and even though the land was not demised to him for mining purposes, when relieved from the liability for waste, he could convert mineral deposits to his own use and perform many other acts which would ordinarily be denied the lessee of land for other than mining purposes, and such acts would not enable the lessor or reversioner to hold him liable for waste.<sup>3</sup> But under certain circumstances the lessee could be held liable for waste, although the lessor or reversioner had exempted him from this liability in the instrument of demise,<sup>4</sup> and this can be done whenever the injury results from the willfulness, maliciousness, or gross neglect of the lessee.<sup>5</sup> In such cases, he cannot release himself under the clause exempting him from liability for waste, for it is not sup-

<sup>1</sup> For distinction between abandonment and cesser of work, as regards the action of waste, in quarrying or mining, see *Elias v. Snowden Slate Co.*, 15 M. M. R. 143.

<sup>2</sup> Tiedeman on R. P., § 80, p. 56.

<sup>3</sup> Tiedeman R. P., *ante*, *idem*. 2 Bl. Com. 288; 1 Cruise's Dig. 128; *Lewis Bowle's Case*, 11 Rep. 83; *Pyne v. Dorr*, 1 T. R. 56; *Chalmeley v. Paxton*, 2 Bing. 207. “The intent of this phrase is that new mines may be opened and timber cut. The tenant under pretense of such clause attempting to pull down the castle, was enjoined.” *Vane v. Bernard*, 1 Salk. 161; *s. c.* 2 Vernon, 738; M. M. D. 402.

<sup>4</sup> Tiedeman on Real Property, *supra*.

<sup>5</sup> *Ante*, *idem*. 1 Washb. on R. P. 155.

posed that the lessor intended to exempt him in such cases and an injunction will lie to restrain him from committing acts of willful and malicious waste,<sup>1</sup> or if he has already committed such acts he can be made to respond in damages for the injury resulting to the lessor.<sup>2</sup>

§ 510. **Waste by licensee — Action on the case.** — Inasmuch as mining is carried on in some of the States under rules and regulations, prescribed by the owner of the land, it may be well to premise that such tenants are governed generally by such rules and regulations, and are liable to the owner of the land for any waste committed on the premises where they are at work.<sup>3</sup> Parties mining under such rules and regulations are held to be mere licensees on the premises, where they are conducting their mining operations,<sup>4</sup> and as licensees they are not justified in committing waste, and it is immaterial whether the license is merely parol or reduced to writing, their liability for injuries to the inheritance is the same.<sup>5</sup> The action of case would be the proper remedy of the owner for an injury by a licensee to the inheritance,<sup>6</sup> and

<sup>1</sup> 2 Bl. Com. 288; *Jones v. Hill*, 1 Moore, 100; *Mayo v. Feaston*, 2 McCord Ch. 187; *Mollineux v. Powell*, 8 P. Wms. 268; *Harris v. Thomas*, 1 Hen. & M. 18.

<sup>2</sup> *Vane v. Barnard*, 2 Vern. 788; *Marker v. Marker*, 4 Eng. Law & Eq. 95. And at common law treble damages would be given. 1 Wash. on R. P. 152; 2 Bl. Com. 288.

<sup>3</sup> *Kinleyside v. Thornton*, 2 W. Bl. 1111. But see *West v. Tuende*, Cro. Cor. 187; Co. Lit. 57a.

<sup>4</sup> *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Grubb's App.*, 90 Pa. St. 228.

<sup>5</sup> *Taylor on L. & T.*, § 697, and cases cited; *s. c. McGregor v. Brown*, 10 N. Y. 114.

<sup>6</sup> *Taylor's Land. & Ten.*, § 687, and cases cited. For before one can be chargeable with waste, he must be in possession of the land, and where one has a mere license to mine, or perform other acts upon the

in fact this action has now almost superseded the common law action of waste, and is the ordinary action for the recovery of damages in the case of voluntary waste.<sup>1</sup> By this action any reversioner or remainderman can recover damages, whether he has an estate in fee for life, or for years,<sup>2</sup> and for an injury to the inheritance the action will lie, either against the lessee or a stranger, and against the tenant by sufferance, or for years,<sup>3</sup> even though the waste was committed after notice to quit.<sup>4</sup> But in the case of estates at will and all estates which are made estates at will by statute, this action will not lie, and the action of trespass and not case, is the proper action against the party committing the waste.<sup>5</sup> Generally, however, the action will lie against any of the parties above mentioned, and it is by far the most common remedy, for in cases where the lease contains a covenant against waste, the owner is not confined to his action on the covenant, but at his election may sue in either covenant or case.<sup>6</sup>

§ 511. Joinder of plaintiffs under the code. — The general statutory provision in this, as in other actions, is “that where two or more are jointly entitled, or have a joint legal interest in the property affected, they must in

land of another, his license does not entitle him to the possession, and if he exceeds his license and performs other acts which result in injury to the inheritance, trespass, and not waste, is the proper remedy for the land owner. Grubb's App., 90 Pa. St. 228; Lunsford v. La Motte Lead Co., 54 Mo. 420; *Id.* v. Lockwood, 56 Mo. 68.

<sup>1</sup> Taylor's Land. & Ten., *supra*.

<sup>2</sup> Green v. Cole, 2 Wms. Saund. 252.

<sup>3</sup> Kinleyside v. Thorton, *supra*.

<sup>4</sup> Taylor's L. & T., *supra*.

<sup>5</sup> Taylor's L. & T., § 687, p. 281; Goodnight v. Vivian, 8 East, 190.

<sup>6</sup> Harder v. Harder, 26 Barb. 409. And in ascertaining the damages for the waste committed, the jury, in such an action, can take into con-

general join in the action.”<sup>1</sup> Under this provision partners must join in an action for waste committed in regard to the partnership estate,<sup>2</sup> and although, at common law, tenants in common could not join in an action for an injury to the estate, unless they were jointly affected by the injury,<sup>3</sup> where they were all affected by the injury, as in personal actions, they must all join in seeking the redress.<sup>4</sup> In actions for injuries to the title, tenants in common are not required to join, for as the titles spring from different sources, an injury to the title of one may have nothing to do with that of another;<sup>5</sup> but as the possession of such tenants is joint, they are all equally affected by an injury to the possession in proportion to their several interests and all should join in an action for such an injury.<sup>6</sup> This statute does not permit several actions for the same injury by those having a common interest therein. It prevents different actions for the same trespass or for other injury where the title to the land is not affected and the damages survive to all.<sup>7</sup> At common law, if any one of the plaintiffs in such an action failed to show an existing right to sustain the cause, this prevented the other from recovering,<sup>8</sup> but under the code the equitable rule has been adopted which permits “all persons having an interest in the subject of the action and

sideration, not only the market value of the mineral removed, but also the injury resulting to the inheritance from the removal. As to measure of damages in such cases, see *Austin v. Coal Co.*, 72 Mo. 535.

<sup>1</sup> See code provisions of different States.

<sup>2</sup> *Medburg v. Watson*, 6 Met. 246.

<sup>3</sup> See Bliss Code Pleading, § 24.

<sup>4</sup> *Love v. Dobyms*, 11 Mo. 106; *Dupuy v. Strong*, 37 N. Y. 372; *Low v. Munford*, 14 Johns. 426.

<sup>5</sup> Bliss on Code Pleading, *supra*.

<sup>6</sup> Bliss C. P., § 24, p. 30 and cases cited.

<sup>7</sup> Bliss C. P., *supra*.

<sup>8</sup> 1 Chitty's Pleading, § 65.



the relief " to join as plaintiffs, and under this provision a judgment can be given in favor of one or more of the plaintiffs and against the others.<sup>1</sup>

§ 512. **When equity will interfere.**—The original province of a court of equity was to provide remedies in cases wherein the common law remedy was defective, and since at common law there was no remedy until the waste had actually been committed, it was early recognized as clearly within the jurisdiction of a court of equity to interfere to restrain such acts as would result injuriously to the inheritance.<sup>2</sup> A lessor need not, relying on his legal remedy, wait until waste has actually been committed, but when he discovers any act on the part of the tenant, which would cause permanent injury to the inheritance, if carried into effect, equity will grant an injunction to restrain him from carrying out this act.<sup>3</sup> And if such act would result injuriously to the inheritance, it is immaterial whether he has shown an intention to commit waste or not, an injunction would be granted,<sup>4</sup> and where there is a covenant on the part of the lessee against the commission of a certain act, or the lessee is about to commit an act in contravention of such covenant, an injunction will lie to restrain him from doing this act, whether it amounts to waste or not.<sup>5</sup> An injunction will also lie to prevent the

<sup>1</sup> Bliss on C. P., § 24, p. 31.

<sup>2</sup> Bispham's Principles of Equity, § 431, and cases cited; Bishop of London v. Webb, 1 P. Wms. 526; Blanchard & Weeks Ld. Cas., p. 323; U. S. v. Parrott, 1 McAll C. C. 271; 2 Story's Eq. Jur. 929; Breman v. Gaston, 17 Cal. 372; McLaughlin v. Kelly, 22 Id. 212; Sedman v. Vaudry, 16 Ves. 393; and see B. & W. L. C., p. 645.

<sup>3</sup> Taylor's Land. & Ten. 691; 2 Story's Eq. Jur. 179; Bisph. Prin. Eq. 431-434.

<sup>4</sup> Kingston v. Eve, 2 Ves. & B. 349; Caldwell v. Bayles, 2 Mer. 408.

<sup>5</sup> Taylor's Land & Ten., § 691, p. 284; citing Rollfe v. Peterson, 2 Bro. P. C. 436; Lewis v. Fothergill, 5 Ch. App. 103; Abinger v. Ashton, L. R. 17 Eq. 358; B. & W. L. C. 646.

cutting of vast quantities of timber, in abuse of the privilege to take such an amount as would be reasonably necessary for the purpose for which the land was leased;<sup>1</sup> but the cases are so numerous in which an injunction will lie to prevent waste, that it is not deemed necessary to dwell on special cases. But equity will not permit an inequitable use of this remedy, where it would work a hardship on the lessee, and if the lessor encourages him to make expenditures and he does so on the belief that the lessor does not mean to prevent him in his labor by the assertion of his legal rights, the latter would be estopped afterward from maintaining his rights to the injury of the lessee, and though he could have recovered his rights in the first instance, if he stands by and sees the lessee make valuable improvements, without objection, he thereby impliedly assents to the same, and cannot afterwards interfere with the same, to the injury of the lessee.<sup>2</sup>

<sup>1</sup> *Blanchard & Weeks* *Ld. Cas.*, pp. 645, 646, 647; *Mitchell v. Dors*, 6 *Ves.* 147; *Thomas v. Oakley*, 18 *Ves.* 184; *MacSwinney on Mines*, pp. 43-57.

<sup>2</sup> See for a full exposition of this subject *Bispham's Prin. of Eq.* (203-260) under subheads of the Equitable Doctrine of Laches and Estoppel. And it has been a question of some doubt how far the courts would restrain improvements on public land, as against miners thereon, and the courts in the past, in such cases have proceeded cautiously. See *Slade v. Sullivan*, 17 *Cal.* 102; *Blan. & Weeks* *Ld. Cas.* 646. "The court of chancery has jurisdiction to stay waste in opening mines where the defendant has threatened to open them and insists upon his right so to do." *Gibson v. Smith*, 2 *Atkyns* 182; *s. c.* *Barnad*, *Ch. Rep.* 497; *M. M. D.* 400. For injunction to prevent repetition of waste by cotenant, see *Morrison v. Morrison*, 122 *N. C.* 598. But in California it is held a cotenant cannot enjoin the working of a mine by another tenant. *McCord v. Oakland Quicksilver Min. Co.*, 64 *Cal.* 134.

## CHAPTER V.

### ACTION ON THE COVENANT.

#### SECTION 513. When it will lie.

- 514. Breach of covenant to work.
- 515. Covenant for quantity.
- 516. Action for royalty — Dead rent.
- 517. Covenant of title — Quiet enjoyment.
- 518. Covenant of warranty.
- 519. Who can maintain the action.
- 520. Against joint and several covenantors.
- 521. How to plead the breach.
- 522. Equitable relief against penalties.
- 523. Injunction to restrain breach.
- 524. Set-off and other defenses.

§ 513. When it will lie. — The action of covenant will lie for the breach of any agreement under seal, and damages can be recovered for such breach, whether the covenant is express or implied and appears in a deed-poll, or an indenture.<sup>1</sup> The action is particularly applicable, in cases where the damages resulting from the breach have not been specifically calculated, for in such cases the amount of the damages is determined by the jury and the plaintiff can recover damages for the whole amount of his demand;<sup>2</sup> but where the damages are for a specific demand, which can be accurately calculated, the action of debt, at common law, was to be preferred.<sup>3</sup> But it is

<sup>1</sup> It existed independent of the right of distress at common law. MacSwiney on Mines, p. 226; Tiedeman R. P., § 849 *et sub.*; Taylor's Land. & Ten., § 661 *et sub.*

<sup>2</sup> Wait's Act & Def. (Vol. 2.), p. 353; (Vol. 4) p. 273, and cases cited; Schock v. Anthony, 1 M. & S. 573.

<sup>3</sup> Taylor's Land. & Ten., § 663. And where breach amounts to a tort lessor has his election. *Ante, idem*; Kinlowside v. Thorton, 2 W. Bl. 1111.

optional with lessor, in the case of a breach of covenant by the lessee, where the demand is for a liquidated sum, whether he proceeds in debt or in covenant, for any time before an assignment by the lessee and an attornment by the assignee, the lessor can select either one or the other of these actions.<sup>1</sup> After an assignment by the lessee, however, he cannot be held on the action of debt, nor could he then be held on the action of covenant, unless the covenant was one expressed in the agreement, for after such assignment he cannot then be held on an implied promise.<sup>2</sup> The lessor can maintain the action of covenant against his lessee for a breach of his agreement to pay the stipulated rent or royalty and he can recover the rent past due, even after there has been a re-entry by the lessor;<sup>3</sup> but where the lessee has been evicted by the assertion of a paramount title, the lessor at common law can sue only in debt, for the recovery of past due royalty, and the lessee cannot be held liable on his personal covenant.<sup>4</sup> These distinctions are of course abolished under the code, but in order to thoroughly understand the nature of an action and its

<sup>1</sup> *Byron v. Johnson*, 8 T. R. 410.

<sup>2</sup> "A covenant to deliver up mining works in repair runs with the interest of the owner of the fee, and an alienee of the land may sue for its breach." *Martin v. Williams*, 1 H. & N. 816; 26 L. J. Exch. 117; 38 Eng. L. & Eq. 462; B. & W. L. C. 432.

<sup>3</sup> *MacSwiney on Mines*, p. 226; *Hartshorn v. Watson*, 5 Scott, 506; *Newton v. Nock*, 43 L. T. (N. S.) 197; and see Act 3 & 4 Will. 4, c. 42, §. 28. "Lessors of a mine held entitled to recover, in an action for non-performance by lessees, only for whatever loss was sustained according as the mine proved profitable or otherwise, and hence not entitled to recover the cost of machinery, tools and improvements which defendants failed to supply or make under their contract." *Cleopatra Min. Co. v. Dickinson* (Wash.), 68 Pac. Rep. 456.

<sup>4</sup> *Taylor Land. & Ten.*, § 662; *Stevenson v. Lombard*, 2 East, 575. But see, *contra*, *Mayor v. Thomas*, 10 Q. B. D. 48.

application in a given case to attain the proper remedy, they are none the less practical and beneficial.<sup>1</sup>

§ 514. **Breach of covenant to work.** — The covenant to work is one of the most frequent as well as important covenants in every mining lease, and they vary almost as much as the different leases in which they are incorporated, applying alike to the length of time and the quantity of ore to be worked and extracted from the demised mine.<sup>2</sup> Generally, however, an action on such covenant in damages is the proper and only remedy in case of a breach.<sup>3</sup> If a lessee covenants absolutely to "continue work," and "carry on mining operations," he will be liable in an action for damages, in case of a breach on such a covenant, aside from his liability on the covenant for rent and royalty, and notwithstanding the continued working of the mine would have been a useless and unprofitable expense to him.<sup>4</sup> In order to recover on such a covenant, however,

<sup>1</sup> See statutes and codes of civil procedure of the different States.

<sup>2</sup> See, as to method of working, *Lewis v. Fothergill*, L. R., 5 Ch. App. 108; as to quantity to be worked, *Powell v. Burroughs*, 54 Pa. St. 329; *Clifford v. Watts*, L. R., 5 C. P. 577.

<sup>3</sup> Specific performance will not lie for breach. *MacSwinney on Mines*, pp. 229-230; *Wheatley v. Westminster & Co. Coal Co.*, 9 Eq. 533; *Booth v. Pollard*, 4 Y. & C. Ex. Eq. 61; *Pollard v. Clayton*, 4 Kay & J. 462.

<sup>4</sup> *Jervis v. Tomkinson*, 1 H. & N. 195; *James v. Cochrane*, 7 Exch. 170; *Marquis of Butte v. Thompson*, 13 M. & W. 487; s. c. 14 L. J. Ex. 95; *Powell v. Burroughs*, 54 Pa. St. 329. But see *Clifford v. Watts*, L. R., 5 C. P. 577; *Ridgway v. Sneyd*, 1 Kay, 627. Where lessee has covenanted to mine in a way to support the surface and higher strata of mineral he must do so, notwithstanding it is more expensive than is customary. *Beattie v. Coal Co.*, 56 Mo. App. 221. Damages result and an action will lie therefor to recover for failure to bore oil wells agreed to be bored by lessee, but forfeiture cannot be had, without express covenant for the purpose. *Harness v. Oil Co.*, 38 S. E. Rep. 662 (W. Va. 1901); *Ammons v. South Penn. Oil Co.* (W. Va.), 35 S. E. 1004. "Where, in a lease of oil lands, the lessee agrees to complete a second

the obligation must be express on the part of the covenantor or lessee, and the mere fact that he had obligated himself "in working" the mine, to do and perform certain acts specifically mentioned, would not justify a recovery on such a covenant.<sup>1</sup> But where the covenant does impose the obligation to work or mine in a specified way, and he fails to perform the same he is *prima facie* liable for any damage resulting, and the fact that he has further covenanted to perform other acts would not excuse the breach.<sup>2</sup> Nor would the impossibility of performance, where the covenant was absolute, constitute any defense for the breach, for having assumed the obligation, the law places a duty on the covenantor, "and he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract."<sup>3</sup>

well, within 90 days after the completion of the first well, but does not agree to complete, or even to commence, the first well, such agreement as to the second well is no consideration for the contract." *Federal Oil Co. v. Western Oil Co.* (U. S. C. C., D. Ind.), 112 Fed. Rep. 373.

<sup>1</sup> *James v. Cochrane*, 7 Exch. 170; *MacSwinney on Mines*, p. 229; *Walker v. Jeffries*, 1 Ha. 850; *Jervis v. Tomkinson*, 1 H. & N. 195.

<sup>2</sup> *Jervis v. Tomkinson*, *supra*; *MacSwinney on Mines*, *supra*. But where the covenant is to work the mine "in a workmanlike manner," and the evidence developed that they had not been worked at all, there is no breach of this covenant. *Quarrington v. Arthur*, 10 M. & W. 335.

<sup>3</sup> *Harrison v. Ry.*, 74 Mo. 371; *White v. Ry.*, 19 Mo. App. 401; *McDermott v. Jones*, 2 Wall. 1; *The Hareiman*, 9 Wall. 161. And this rule of construction has been applied to covenant to drain a mine, however impossible of performance it may have been. See *Brinkerhoff v. Elliott*, 43 M. A. 186. The remedy in an ordinary case of an agreement to work a quarry in a particular manner is at law: specific performance refused. *Booth v. Pollard*, 4 Y. & C. 61; M. M. D. 332. "Custom cannot control the contract of parties as to the working of a mine. A custom to remove coal pillars cannot avail against the terms of a lease, contracting to leave the mine in good working condition." *Randolph v. Harden*, 44 Iowa, 328; M. M. D. 305. "A covenant in a coal lease 'to carry on the colliery, in a fair, proper, and orderly manner and according to the best and most approved method of work-

§ 515. **Covenant for quantity.** — Where there is an absolute covenant on the part of the lessee to raise a specified quantity of ore, his liability on such covenant does not depend upon his finding the ore in such quantity, for this is his own risk, and he is generally liable on the covenant, in case of a failure to raise the given quantity, whether he was successful in extracting it or not.<sup>1</sup> And where the covenant is absolute the same general rule applies, regardless of the impossibility on the part of the covenantor of complying with the same, for the law will not relieve on account of the impossible, in such cases, and this seems to be the settled doctrine.<sup>2</sup>

ing collieries of alike nature on the rivers Tyne and Wear and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof.' *Held*, not only to authorize but to bind the lessees so to work the mines as to get out the largest quantity of coal consistent with the safety of the mines, without regard to the surface or to building erected subsequent to the lease." *Taylor v. Shafto*, 8 B. & S. 251; *Shafto v. Johnson*, 8 B. & S. 252; *M. M. D.* 197. In Ohio it is held exhaustion of oil relieves one from covenant to drill second well. *Kenton Gas &c. Co. v. Orwick*, 21 Oh. Ct. Ct. Rep. 274. But see as to continuous covenant to pay as long as oil is produced, *Harness v. East Oil Co. (W. Va.)*, 38 S. E. Rep. 662. On breach of a covenant to sink oil wells or pay a certain rental the rent agreed to be paid and not unliquidated damages can be recovered. *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 34 L. R. A. 62; *Young v. Equitable Gas Co.*, 5 Pa. Super. Ct. 232 The measure of damages for breach of covenant to bore oil wells is the value of the oil that should have been produced, less amount produced and interest on the difference. *Bradford v. Blair*, 113 Pa. St. 83; *Keppner v. Lemon*, 176 Pa. St. 502.

<sup>1</sup> *Jarvis v. Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41; *Mellers v. Devonshire*, 16 Beav. 252; *s. c.* 22 L. J. Ch. 310; *Ridgway v. Sneyd*, 1 Kay 627; *Powell v. Burroughs*, 54 Pa. St. 329; *Whitehead v. Bennett*, 9 W. R. 628; *Simpson v. Ingleby*, 20 W. R. 993.

<sup>2</sup> *Jarvis v. Tomkinson*, *supra*; *Brinkerhoff v. Elliott*, 43 Mo. App. 186-194; *McDermott v. Jones*, 2 Wall.; *The Hareldman*, 9 Wall. 161. The non-existence of merchantable ore is a good defense for a covenant to produce given quantity. *Diamond Iron Min. Co. v. Buckeye Co.*, 70 Minn.

But some of the courts have leaned to a more equitable rule as to the rights of the covenantor in such cases, holding that where the mineral had been exhausted prior to the execution of the covenant, as there is a total failure of consideration, this of itself would prevent an enforcement of the covenant.<sup>1</sup> And others have gone to the extent of holding that even if the mineral did not exist in such quantities as that covenanted to be raised, this of itself would relieve the lessee from a performance, because he had contracted with reference to a state of things that did not in fact exist;<sup>2</sup> but the weight of authorities is in accordance with the former proposition and the rule is that the law will not relieve from the performance of an absolute covenant, on account of any particular hardship resulting to the covenantor from the enforcement.<sup>3</sup>

500; 78 N. W. Rep. 507; *Bannan v. Graeff*, 186 Pa. St. 648; 40 Atl. Rep. 805. A covenant for the removal of an average of 12,000 tons annually does not require the excavation of this quantity yearly. *Oglesby v. Hughes*, 96 Va. 115; 80 S. E. Rep. 439.

<sup>1</sup> *Murdock v. Fullerton*, 5 Moak, 414; L. R. 2 Sess. App. 273; *Gowan v. Christie*, 5 Moak's Eng. R. 114; L. R. 2 Scotch App. 273; *Blanchard and Weeks Ltd. Cas.*, p. 429 *et sub.*

<sup>2</sup> *Clifford v. Watts*, L. R. 5 C. P. 577; *s. c.* Mor. Min. Dig., p. 196 *et sub.* And see where there was a total exhaustion of mineral. *Gowan v. Christie*, 5 Moak, 114; L. R. 2 Sc. App. 273. But see, *contra*, *Phillips v. Jones*, 9 Slim. 519; *Bute v. Thompson*, 13 M. & W. 487.

<sup>3</sup> *Bute v. Thompson*, *supra*; *Barker v. Hodgson*, 3 M. & S. 267; *Paradine v. Joyne*, Alleyne, 26; *Hills v. Lughene*, 15 M. & W. 253; B. & W. L. C. 429; *Phillips v. Jones*, 9 Slim. 519; *Powell v. Burroughs*, 54 Pa. St. 329; *Brinkerhoff v. Elliott*, 43 Mo. App. 186 and cases cited. The rule of construction adopted by Portia, in curtailing Shylock's rights, beyond the strictness of Antonio's covenant, has, as an abstract proposition, been seriously criticised by an eminent jurist for the reason given, and so the law is written in its strictness. See Prof. von Ihering's "Struggle for Law," pp. 80-81 *et sub.* "An ordinary sale of coal carries no warranty of quality, but without words of express warranty, a warranty of quality may be inferred from the terms used in making the contract." *Warren v. Philadelphia C. Co.*, 83 Pa. St. 487; M. M. D. 399. "Cov-



§ 516. **Action for royalty — Dead rent.** — An action on the covenant for royalty exists, independent of the common law right of distress,<sup>1</sup> and lies for a failure to pay the specified per cent of the ore produced,<sup>2</sup> or to recover whatever of dead rent may be in arrear at the time of the action.<sup>3</sup> Where a dead rent is reserved, or rent reserved on a specified quantity of mineral to be produced, the lessee or covenantor becomes liable absolutely for such rent and royalty, regardless of the productiveness of the mine,<sup>4</sup> and the lessee in such case could not escape liability by offering to pay according to the quantity of mineral produced,<sup>5</sup>

enant to raise a given quantity of pipe-clay construed with reference to covenants as to rent, and with regard to the subject-matter, and *held*, not applicable if the given quantity of clay did not exist in the premises. The entire lease is set forth in the case." *Clifford v. Watts*, L. R., 5 C. P. 577; *Marquis of Bute v. Thompson*, 13 M. & W. 487, distinguished; *Id.* M. M. D. 196. "A covenant to raise not less than 1,000 nor more than 2,000 tons of pipe-clay, each year, in a lease reserving a rent at a sum certain per ton, not necessarily construed to be a covenant to raise such minimum number of tons, or pay damages, whether the clay be under the land or not, where from the whole instrument it can be gathered that it was the intention that such covenant should not take effect unless there was clay to that amount in the land demised." *Clifford v. Watts*, L. R., 5 C. P. 577; M. M. D. 399, 196.

<sup>1</sup> *Jesus Coll. v. Bloome*, Amb. 55; *Pulteney v. Warren*, 6 Ves. 78; *Parrott v. Palmer*, 8 M. & K. 682.

<sup>2</sup> *Jones v. Reynolds*, 7 C. P. 835.

<sup>3</sup> *MacSwinney on Mines*, p. 215 *et sub.*

<sup>4</sup> *MacSwinney on Mines*, *supra*; *Haywood v. Cope*, 25 Beav. 140; *Bute v. Thompson*, 13 M. & W. 487; *Ridgway v. Sneyd*, 1 Kay, 627.

<sup>5</sup> *Phillipps v. Jones*, 9 Sim. 519; *Mellers v. Devonshire*, 15 Beav. 252. No defense to lessee on covenant to pay fixed rent that premises were non-productive of oil or gas. *Springer v. Gas Co.*, 145 Pa. St. 480; 22 Atl. Rep. 986. For enforcement of covenant for minimum royalty, see *Coal Cr. Min. Co. v. Tenn. Coal, Iron & Co.*, 106 Tenn. 651; 62 S. W. Rep. 162. A fixed rental to be paid until completion of a well for oil cannot be avoided because the lessee never entered upon the demised premises, as it is due and payable, unless he was prevented by the lessor from completing the well. *Lawson v. Kirchner*, 40 S. E.

even though the rent is not payable "whether the minerals exist or not,"<sup>1</sup> and if the lessee had only covenanted to pay rent on mineral produced after a certain quantity had been mined, he could not avoid his liability on the covenant by fraudulently failing to mine the specified quantity.<sup>2</sup> But unless the lessee has covenanted to pay royalty on a specified amount of ore or to pay a certain sum as dead rent, he could only be held for the stipulated royalty on the ore produced, and even where he had covenanted to pay on a specified amount, it has been held that if by reference to the entire contract he had intended to make his obligation to pay conditioned on the existence of the ore in such quantities and the ore did not exist, then the covenant could not be enforced.<sup>4</sup> And where the covenant was only to pay

Rep. 344; 50 W. Va. 344; *Wheeling v. Phillips*, 10 Pa. Ct. 634; *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95; *Leatherman v. Oliver*, 151 Pa. St. 646; *McMillan v. Phila. Co.*, 159 Pa. St. 142. Inability to work without loss will not relieve from covenant to pay minimum royalty. *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219.

<sup>1</sup> *Powell v. Burroughs*, 54 Pa. St. 329; *Mellers v. Devonshire*, *supra*.

<sup>2</sup> *Green v. Sparrow*, 8 Swanst. 408; *MacSwinney on Mines*, p. 216.

<sup>3</sup> *Morris v. Smith*, 8 Dougl. 279; *Smith v. Morris*, 2 B. C. C. 311; *MacSwinney on Mines*, p. 216; *Walker v. Jeffries*, 1 Ha. 352. But covenant to pay rent upon a gas well, is subject to the implied condition that it must remain a "gas well" in order for the rent to be collected. And where, owing to the fault of the lessee, the well is so flooded with salt water as to prevent production of gas, the rent cannot be collected. *McConnell v. Lawrence Nat. Gas. Co.*, 30 Pitts. Leg. J. 346. A lease providing for a fixed rental on a gas property, "so long as gas shall be sold therefrom," carries with it an implied covenant to market the gas produced from the well. *Iams v. Carnegie Nat. Gas Co.*, 194 Pa. St. 72; 45 Atl. Rep. 54. Royalty will not cease by a failure to use the mineral oil or gas simply; but to end such right to royalty, the lessee must surrender his lease. *Double v. Union H. & L. Co.*, 173 Pa. St. 388; 33 Atl. Rep. 694.

<sup>4</sup> *Clifford v. Watts*, L. R., 5 C. P. 577; *Murdock v. Fullerton*, 5 Moak, 414.

according to the minerals produced,<sup>1</sup> or in case they could be profitably worked,<sup>2</sup> the covenant would not be violated in case of a failure of either of the conditions precedent, although the burden of proof would in such case be on the party seeking to avoid the covenant.<sup>3</sup>

§ 517. **Covenant of title — Quiet enjoyment.** — There are but few implied covenants in the transfer of mines, but where covenants are express in the sale or demise of mines the same rules that apply to other titles are applicable and the rights of the respective parties thereunder are governed by the same methods of procedure. The covenant for quiet enjoyment in a lease of a mine has been held to be infringed by the lessor subsequently entering and working an upper seam of mineral whereby the roof of the demised mine caved in and the mine was flooded with water, and the lessee is entitled to damages for such breach;<sup>4</sup> and so

<sup>1</sup> MacSwinney on Mines, p. 218.

<sup>2</sup> Jones v. Shears, 7 C. & P. 346. But see Cartwright v. Foreman, 7 B. & S. 247. And, as to effect of lessor's acquiescence in a breach, see Whitehead v. Bennett, 9 W. R. 626.

<sup>3</sup> Clifford v. Watts, *supra*; MacSwinney on Mines, p. 221. "The lessee of a coal mine stipulated to pay a rent for coal exsected, and also to mine a certain number of tons annually: *Held*, that the covenant for rent was distinct from the covenant to mine a certain quantity, and that settlements for coal taken out were no discharge of a breach in the covenant for quantity." Powell v. Burroughs, 54 Pa. St. 329; M. M. D. 196. "A party digging lead ore under a contract to deliver the ore to the proprietor, receiving a certain amount of lead in return, or in cash at his election, has no right to sell the ore, and if sold it may be recovered from a third party." Granby M. & S. Co. v. Turley, 61 Mo. 375; M. M. D. 199. "A lease contained a covenant to raise a certain quantity of iron-stone in each quarter of a year, and pay certain royalties upon it, or else to pay a certain fixed quarterly rent to the landlord: *Held*, that the landlord, having declared in respect of breaches of both the above covenants, and money having been paid into court and accepted in satisfaction of the latter, was entitled to nominal damages only, in respect of the former." Foley v. Addenbrooke, 13 M. & W. 173; M. M. D. 195.

<sup>4</sup> Shaw v. Stenton, 2 H. & N. 858; MacSwinney on Mines, p. 228.

a similar covenant would be violated by a subsequent demise of an underlying strata of mineral, so worked as to cause the floor of the lessee's mine to fall.<sup>1</sup> However, in the sale of the surface of land the fact that the minerals underlying the same had previously been sold and worked out, would not constitute a breach of a covenant for quiet enjoyment, even though the surface should subsequently subside by reason of the removal of the minerals.<sup>2</sup> The covenant could only relate to the condition of the premises at the time of the conveyance and would not cover conditions resulting from prior defects.<sup>3</sup> But the covenant for quiet enjoyment protects the possession of the covenantee and any interference with this right, subsequent to the transfer, would constitute a breach.<sup>4</sup>

<sup>1</sup> *Glasgow v. Hurlet Alum Co.*, 3 H. L. C., 25; *MacSwinney*, *supra*. The lessee of an oil lease has an implied covenant of right of entry and quiet enjoyment and while a second lease will not constitute a breach of this covenant any interference with the possession or working of the lease by the lessor will. *Knotts v. McGregor* (W. Va.), 35 S. E. Rep. 399. In an oil or gas lease there is an implied covenant of quiet enjoyment and any dispossession of the lessee will afford damages. *Knotts v. McGregor* (W. Va. 1901), 35 S. E. Rep. 399. There is also an implied covenant on the lessee's part of diligence and continuous operation. *Huggins v. Dally* (W. Va.), 99 Fed. Rep. 606; 48 L. R. A. 320.

<sup>2</sup> *Spoor v. Green*, L. R., 9 Ex. 99; *Mor. Min. Dig.*, pp. 398-399.

<sup>3</sup> For comments on this case, see *MacSwinney on Mines*, pp. 210-211.

<sup>4</sup> *Schuylkill Co. v. Schowell*, 57 Pa. St. 271. Eviction constitutes a breach. *Walker v. Tucker*, 70 Ill. 527; *Peck v. Hiller*, 24 Barb. 178; *Tiley v. Mayers*, 48 Pa. St. 304. "At common law, the mere fact of 'unworkability to profit' affords no ground for reducing or throwing up a lease of minerals which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely." *Gowan v. Christle*, 5 Moak, 114; L. R., 2 Sc. App. 273. M. M. D. 197. "Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of £300 a year, or so much thereof as, with the royalty, should amount to that sum, such rent of £300 to be a minimum rent for the coal demised. And the lessee covenanted to pay the rents, and to work the mine: *Held*, that a court of equity would not restrain an action by the lessor for the minimum rent, although the

§ 518. **Covenants of warranty.** — In the case of a breach of a covenant of warranty in the conveyance of mines and mining property, the same general rules of law are applicable as in the breach of similar covenants in conveyances of other species of realty. It has been held that a covenant that land conveyed is free from incumbrances is violated by a prior lease of the minerals, existing at the time of the conveyance, and under which the lessees had covenanted to remove all the ore in the land, and had, in fact, removed the same and the pillars supporting the surface, which caused a subsidence of the surface subsequent to the transfer.<sup>1</sup> And so a sale and transfer of all the minerals contained in a tract, with privileges and easements connected with their removal, is a breach of a covenant of warranty that such land is free from all incumbrances.<sup>2</sup> A mere parol license to mine, however, will not constitute a breach of a covenant against incumbrances,<sup>3</sup> nor would the existence of a lease to mine be held a breach of such a covenant, if the lessees had conducted no mining operations thereunder at the time of the execution of the covenant, or caused no injury to the land.<sup>4</sup> Neither would a lease and operations resulting in injury to

coal proved to be not worth the expense of working; but that if the lessor were to sue upon the lessee's covenant to work the mine, the court would interfere. *Ridgway v. Sneyd*, 1 Kay, 627; M. M. D. 196.

<sup>1</sup> *Taylor v. Shafto*, 8 B. & S. 228; *Shafto v. Johnson*, 8 B. & S. 252; *MacSwinney on Mines*, pp. 210-211 *et sub.*

<sup>2</sup> *Stambaugh v. Smith*, 23 Ohio St. 585; *Mor. Min. Dig.*, p. 399. A reservation of minerals, which it is stipulated shall only be worked by subterranean workings, is a covenant running with the land. *Electric Co. v. West Ridge Coal Co.*, 187 Pa. St. 500; 41 Atl. Rep. 458. One who buys with notice of a prior deed of the mineral in the land cannot sue for breach of a covenant of warranty. *Sanders v. Rowe*, 48 S. W. Rep. 1088.

<sup>3</sup> *Gesner v. Cairns*, 2 Allen (N. B.), 595; *Mor. Min. Dig.*, p. 399.

<sup>4</sup> *Spoor v. Green*, L. R., 9 Ex. 99; *Mor. Min. Dig.*, *supra*; *MacSwinney on Mines*, pp. 210, 211.

the land constitute a violation of such covenant, where the lease had expired prior to the sale and there had been no operation thereunder subsequent to such time.<sup>1</sup>

§ 519. **Who may maintain the action.** — The owner of the legal interest is the only party who can maintain the action for breach of a covenant.<sup>2</sup> A third party cannot be joined in the action. Those alone are legally interested who are parties to the covenant, and although others may be beneficially interested, they cannot be joined as parties to the suit.<sup>3</sup> It is the general rule of law that the party for whose benefit a contract is made in the name of another, can maintain an action for the breach thereof, the same as the party in whose name the contract is originally made.<sup>4</sup> This is a general rule of pleading, and applies as well to simple written instruments as to contracts under seal. But it has been held in England, in an action on the covenant, that where the lessor authorizes another to execute a lease for him and in his behalf, and the party authorized signed his own name to the lease, he would be the proper party to sue upon the covenant, although the covenants on the part of the lessee were with the lessor by name.<sup>5</sup> The

<sup>1</sup> *Spoor v. Green*, *supra*; see *Taylor v. Shafto*, 8 B. & S. 228, holding to a contrary doctrine; and see also *Shaw v. Stenton*, 2 H. & M. 858, and *Demmett v. Atherton*, L. R., 7 Q. B. 327; *MacSwinnery on Mines*, *supra*. "A warranty of title upon sale of the surface, reserving minerals, is broken by the existence of an outstanding lease of the minerals, under which the lessees are bound to get all the coal without leaving support to the surface." *Taylor v. Shafto*, 8 B. & S. 228; M. M. D. 197.

<sup>2</sup> *Taylor's Land. & Ten.*, § 664.

<sup>3</sup> *Ante, idem.* *Smith v. Emery*, 7 Halst. 53.

<sup>4</sup> *Bliss on Code Pleading*, §§ 55-58, and cases cited. An easement of right of way, not excepted in a covenant of warranty, is a breach of covenant, for which covenantee can recover, although he had knowledge of easement. *Sherwood v. Johnson*, 62 N. E. Rep. 645.

<sup>5</sup> *Berkley v. Hardy*, 5 B. & C. 855.

general rule of equity practice that parties jointly interested in the subject of the action must be joined as plaintiffs or defendants, applies to actions by several covenantees in an action on the covenant.<sup>1</sup> The rule of survivorship also applies to actions by joint covenantees, and where one or more of the joint covenantees is dead, the death of such covenantee should be set up in the petition, and when their interests are joint they must all join in the action, although the covenant may be several;<sup>2</sup> but if their interests are several each may sue, although the covenant may be joint.<sup>3</sup>

§ 520. **Against joint and several covenantors.** — The same rule of pleading applies in regard to those against whom an action on the covenant may be brought.<sup>4</sup> It can only be brought against the party who has executed the instrument. Where the covenant is joint all the covenantors must be joined as defendants,<sup>5</sup> and where it is joint and several they can either be sued jointly or separately.<sup>6</sup> Where there has been a demise, and the covenant is implied from the conveyance, the action must be brought against the party who demised, although there may be others joined in the lease by way of confirmation.<sup>7</sup> The survivor only of two joint covenantors can be sued for a breach and where both are dead the representative of the survivor

<sup>1</sup> See Bliss on Code Pleading, *supra*.

<sup>2</sup> Bliss on Code Pleading, §§ 45-67.

<sup>3</sup> *Ante, idem.* Walt's Act. & Def. (Vol. 2), p. 369. Only the personal representative of covenantee can maintain suit after his death. *Richard v. Bent*, 59 Ill. 38; *s. c.* 14 Am. Rep. 1; Walt's Act. & Def. (Vol. 2), pp. 398-399.

<sup>4</sup> Bliss Code Pleading, §§ 67-45.

<sup>5</sup> *Duke of Northumberland v. Ernington*, 5 T. R. 522; *Buckner v. Hamilton*, 16 Ill. 487.

<sup>6</sup> *Ensp v. Dormithorn*, 2 Burr. 1196; Walt's Act. & Def. (Vol. 2), p. 369.

<sup>7</sup> *Smith v. Pocklington* 1 Cr. & J. 445.

is the proper party to sue for the breach.<sup>1</sup> One covenantor cannot affirm an act which he did not previously authorize, and make himself liable for a breach resulting as a consequence of such act, and, in a joint covenant, where the breach occurs by reason of the wrongful act of one of the covenantors, those who would otherwise have been liable, if the wrongful act had been joint, cannot be held liable for this breach;<sup>2</sup> but the covenant, so far as the breach is concerned, would be considered several, and the party whose tort occasioned the breach could alone be held for the consequences of his wrongful act.<sup>3</sup> Executors and administrators can also be sued on the covenants of their testator, and where the covenant is joint, they can be held jointly responsible for a breach occurring after the death of the covenantors.<sup>4</sup> But if the covenant is one that terminates with the death or disability of the covenantor, or one to be performed by him personally, the executor or administrator cannot be held to a performance of the covenant,<sup>5</sup> and where the breach occurs during the life of the testator, his executor might be sued in his representative

<sup>1</sup> *Bundy v. Williams*, 1 Root (Com.) 548; *Lang v. Keppell*, 1 Burr. (Penn.) 123.

<sup>2</sup> *Taylor's Land. & Ten.*, § 668.

<sup>3</sup> *Coleman v. Sherwin*, 1 Salk. 137.

<sup>4</sup> *Walt's Act. & Def.* (Vol. 2), pp. 360, 361. Where the covenant runs with the land the action can also be brought against the heir, if property has descended to him. *Plummer v. Marchant*, 3 Burr. 1380; *McClurk v. Gamble*, 27 Pa. St. 290; *Chapman v. Holmes*, 10 N. J. (Saw.) 20. The assignee of a lease is bound by the covenants of the lease the same as the original lessee and can be sued for breach thereof. *Ind. Nat. Gas & Oil Co. v. Hinton*, 64 N. E. Rep. 224. In an action for royalty by lessor against assignee of oil lease the burden of establishing the assignment is on the lessor. *Heller v. Dalley*, 63 N. E. Rep. 490.

<sup>5</sup> See, as to personal covenants and contracts and the right to sue thereon after death of covenantor, *Bliss on Code Pleading*, § 48, p. 64; 1 *Chitty's Pleading*, 51; *Schultzer v. Johnson*, 5 B. Mon. 497.



capacity, and the judgment should be rendered *de bonis testatoris*.<sup>1</sup>

§ 521. **How to plead the breach.** — In pleading the breach of a covenant it is necessary to state that the agreement was under seal, and as the codes of most of the States require that the instrument sued on, or a copy, should be filed with the pleadings in the cause, the contract should either be filed with the petition, or reasons stated why the same is not done.<sup>2</sup> It is not necessary to set forth the entire contract, but only that part wherein the breach occurred is essential to be stated.<sup>3</sup> That part of the covenant which is pleaded may either be set forth according to its legal effect, or in the exact language of the covenant,<sup>4</sup> but as the code discourages the pleading of legal conclusions it is always best to plead the clause wherein the breach occurred in the exact language of the contract.<sup>5</sup> It has also been held that the breach can be pleaded according to its legal effect, or set forth as a negative to the violated conditions of the covenant,<sup>6</sup> but under the code practice it would seem to be better pleading to set it up as a negative to that part of the covenant pleaded.<sup>7</sup> If the covenant is broken in several conditions, the different breaches may all be set forth in one cause of action,<sup>8</sup> and

<sup>1</sup> Taylor's Land. & Ten., § 669; Walt's Act. & Def., *supra*; Collins v. Thoroughgood, Hob. 188. A joint covenant is generally broken when either covenantor fails to do the act agreed to be performed. Wing v. Chase, 35 Me. 250.

<sup>2</sup> Statutes different States; Bliss on Code Pleading, 312; Miles v. Jones, 28 Mo. 87.

<sup>3</sup> Bliss on Code Pleading, *supra*; Macon v. Crump.

<sup>4</sup> Buster v. Wallace, 4 Hen. & M. 82.

<sup>5</sup> Bliss on Code Pleading, § 306; Taylor's Land. & Ten., § 670 and cases cited.

<sup>6</sup> Taylor's Land. & Ten., *supra*.

<sup>7</sup> Bliss on Code Pleading, *supra*.

<sup>8</sup> Harris v. Mantle, 3 T. R. 307; Taylor's Land. & Ten., *supra*.

different causes of action on the same contract may be united in the same petition,<sup>1</sup> but the total amount of the damages sought to be recovered on account of the different breaches, must be stated with sufficient accuracy to enable a recovery for the full amount claimed.<sup>2</sup> The plaintiff should generally allege a performance of the covenant on his part, and where it is the breach of a covenant to pay royalty, the entry of the defendant under the contract should be stated.<sup>3</sup> But as the same general rules of pleading apply to the manner of setting out these different covenants, it is deemed unnecessary to mention them more specifically.<sup>4</sup>

§ 522. **Equitable relief against penalties.** — When the sum sought to be recovered, is in the nature of a penalty, equity will interfere to relieve the defendant from the necessity of paying a sum in excess of the actual value of the injury sustained by reason of the breach. A court of equity will proceed to ascertain the real amount of the damages suffered, and give the plaintiff such an amount as would reasonably compensate him for the breach.<sup>5</sup> If the lessee covenants to confine his mining operations to a certain tract of land, and agrees to pay a penalty for a breach of this covenant, or in case he should mine upon another

<sup>1</sup> Bliss on Code Pleading, §§ 127-130; *Jones v. Johnson*, 10 Bush, 649; *Dye v. Kerr*, 15 Barb. 444.

<sup>2</sup> *Taylor's Land. & Ten.*, *supra*.

<sup>3</sup> *Hurst v. Rodney*, 1 Wash. 375; *Worthington v. Hughes*, 19 Ohio St. 66; *Lonwith v. De Silver*, 1 Brown (Pa.), 221; *Wait's Act. & Def.* (Vol. 2), pp. 394-395.

<sup>4</sup> See Bliss on Code Pleading, *supra*, and cases cited.

<sup>5</sup> It is the tendency of the law to regard a sum payable on breach of a covenant as a penalty, and not as liquidated damages, for the reason that the damages are then apportionable to the injury sustained. *Wait's Act. & Def.* (Vol. 2) 486; *Chaddicke v. Marsh*, 21 N. J. (Law) 463; *Wallis v. Carpenter*, 18 Allen, 19; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186; and see *Brown v. Bellows*, 4 Pick. 179.

tract, after a breach of this covenant the lessor could only recover the actual value of the damages sustained by reason of the lessee's mining upon such tract, and if the penalty is in excess of this amount, equity would relieve him from the same.<sup>1</sup> But where the act to be done is single, and the sum sought to be recovered for the breach is in the nature of liquidated damages, as where the lessee agrees to pay a fixed sum for every acre mined, in addition to that originally demised, the lessor could recover for each additional acre mined, in proportion to the sum covenanted to be paid.<sup>2</sup> Formerly, equitable relief against penalties could only be obtained in a court of equity;<sup>3</sup> but as the object of the courts was to prevent the recovery of unreasonable penalties, courts of law now exercise jurisdiction to relieve from recovery of a whole penalty, where smaller damages would reasonably compensate the injured party, and as remarked by an eminent author, "the court will look into extrinsic circumstances for the purpose of determining whether the sum mentioned is intended for a penalty or as liquidated damages."<sup>4</sup>

§ 523. **Injunction to restrain breach.** — The system of preventive justice, exercised by a court of equity, by means of an injunction, is one which the court will not ordinarily assume for the purpose of preventing or restrain-

<sup>1</sup> *Dennis v. Cummings*, 3 John's Cas. 297; *Brown v. Bellows*, 4 Pick. 179; *Richards v. Edick*, 17 Barb. 260.

<sup>2</sup> *Clement v. Cash*, 21 N. Y. (7 Smith) 253; *Noyes v. Phillips*, 60 N. Y. (15 Sick.) 408; *Staples v. Parker*, 41 Barb. 648.

<sup>3</sup> *Taylor's Land. & Ten.*, § 675; *Bispham's Prin. of Eq.*, §§ 178-180.

<sup>4</sup> *Taylor's Land. & Ten.*, § 673, and cases cited, where the agreement is not under seal and the damage is susceptible of compensation and estimation, the sum agreed upon will be treated as a penalty, although called 'liquidated damages' in the contract. *Walt's Act. & Def.* (Vol. 2), p. 437; *Graham v. Bickham*, 4 Dall. (Tenn.) 150; *Davies v. Penton*, 6 B. & C. 216; *Pinkerton v. Caslon*, 2 B. & Ald. 704.

ing the breach of a covenant.<sup>1</sup> Ordinarily the parties are left to their legal remedies — to an action at law for damages for the breach,<sup>2</sup> — and a court of equity will not interfere to decree the specific performance of a contract, until it is clearly shown that the legal remedy would furnish inadequate or defective relief to the injured party.<sup>3</sup> There are certain cases, however, in which a court of equity will exercise jurisdiction to prevent the breach of a covenant by enjoining the party about to commit the breach.<sup>4</sup> But the performance of the covenant must be practical before a court of equity would interfere in such a case, and it would not enter up a decree where it would be impossible for it to enforce the same, or where the execution of the decree would be a vain or idle act. This rule underlies the whole doctrine of specific performance, upon which exhaustive works have been written.<sup>5</sup> Of course the court will never entertain jurisdiction for the purpose of indulging malice, or in order to carry out the caprice of the party applying for the injunction, and it should always appear that there is an express covenant of the party sought to be enjoined against the act about to be committed at the time of the application.<sup>6</sup> And acts which amount to waste, where there is an express covenant against it, will be enjoined by a court of equity, and although this action is but little used, there are still many cases of breach of

<sup>1</sup> Bispham's Prin. of Equity, §§ 461-464.

<sup>2</sup> *Ante, idem.* Hill v. Barclay, 16 Ves. 405.

<sup>3</sup> Seabourne v. Powell, 2 Vern. 11; Bisp. Prin. of Eq., *supra*.

<sup>4</sup> This is particularly so in the case of a negative covenant. Fothergill v. Rowland, L. R. 1 Eq. 132. See, as to removal of machinery, Hamilton v. Dunsford, 6 Irish Ch. 412.

<sup>5</sup> See, as to covenant to work, Pollard v. Clayton, 1 Kay & J. 462; Wheatley v. West Brymbo Coal Co., 9 Eq. 539; MacSwinney on Mines, pp. 228-229; Fry. Spec. Per. Con. 161.

<sup>6</sup> Bispham's Prin. of Eq., *supra*, and cases cited.

covenant where damages at law would be inadequate to compensate the injured party, and in such cases relief may be sought by injunction, to restrain the commission of acts which would amount to a breach of the covenant.<sup>1</sup>

§ 524. **Set-off and other defenses.** — In an action for royalty by the lessor, the lessee cannot bring in an off-set for damages sustained by reason of the lessor's breach of some of the covenants on his part in the instrument of demise,<sup>2</sup> but he is entitled to a recoupment for any damages he may have suffered by reason of the lessor's breach, or for any payment that he may have made on the lessor's account.<sup>3</sup> Where an assignee undertakes to perform all the covenants that the original lessee failed to perform, he will be liable for all such failures to the original lessor and can be held for such royalty as the original lessee failed to pay, although the assignee in turn may have assigned the lease before any of the royalty became due from him.<sup>4</sup> An eviction by the lessor is generally a good defense to an action for royalty, but although a partial eviction suspends the whole royalty, it is no defense for a breach of other covenants in the lease.<sup>5</sup> A surrender will not operate as a complete defense to an action for breach of a covenant to pay royalty, where a part of the royalty had occurred before the surrender was made.<sup>6</sup> It only has the effect of stopping the royalty from the time the surrender was made, and the lessor is entitled to recover whatever became due

<sup>1</sup> Taylor's Land. & Ten., § 685, p. 279, and cases cited; Bispham's Prin. of Equity, §§ 429-434.

<sup>2</sup> Taylor's Land. & Ten., § 682.

<sup>3</sup> Sickles v. Frost, 15 Wend. 559.

<sup>4</sup> Taylor's Land. & Ten., *supra*, p. 277; Port v. Jackson, 17 Johns. 289, 479.

<sup>5</sup> Tilley v. Mayers, 43 Pa. St. 404; Peck v. Hiler, 24 Barb. 178; Walker v. Tucker, 70 Ill. 527; Schuylkill v. Schmale, 57 Pa. St. 271.

<sup>6</sup> *Ante, idem.* Taylor's Land. & Ten., § 682.

before that time.<sup>1</sup> But it is always a good defense in an action for royalty against an assignee, in respect to his privity of estate, for him to show an assignment of the estate before the royalty became due from him, and the lessor could not defeat this defense by proving that the assignment to such assignee was made without the consent or knowledge of the lessor, although the original lessee may have violated a covenant in making such assignment, for the reason that the lessor's proper remedy would have been an action against the original lessee on his covenant not to assign.<sup>2</sup>

<sup>1</sup> *Ante, idem.*

<sup>2</sup> And see as to an equitable assignment and lessor's right of action against equitable assignee, *Cox v. Bishop*, 8 De G., M. & G. 815; *Walters v. Northern C. M. Co.*, 5 *Id.* 629; *Preston v. McCall*, 7 Gratt. (Va.) 121. And see as to prior agreement of assignor, *Turner v. Reynolds*, 23 Pa. St. 199. But see *Crossfield v. Morrison*, 7 C. B. 286; *Fisher v. Milliken*, 8 Pa. St. 111.

## CHAPTER VI.

### ACTION OF EJECTMENT.

**SECTION 525. When maintained at common law.**

- 526. The action under the code.
- 527. Complaint — Description of premises.
- 528. Defendant must be in possession.
- 529. Proof of title.
- 530. Action may be maintained on prior possession.
- 531. Licensee cannot maintain.
- 532. When lessee can deny lessor's title.
- 533. Successful plaintiff entitled to profits.
- 534. Same — Mesne lessee not liable therefor — Defenses.
- 535. Action lies for minerals.
- 536. Same — As regards fixtures.
- 537. Equitable defenses.

§ 525. **When maintained at common law.** — The action of ejectment would lie at common law, when one was in exclusive possession of the land, and the present right to the exclusive possession was in another.<sup>1</sup> The action will lie for anything demisable, but the property must be of a tangible nature, and the action will not lie for a mere incorporeal hereditament, which would only pass by grant.<sup>2</sup> The lessor, at common law, could not enter and maintain the action against his lessee during the continuance of the latter's term, but this disability is avoided by the insertion of a forfeiture clause, giving the lessor a right of entry, upon a breach of the conditions of the lease, and where such a

<sup>1</sup> Plaintiff must allege and prove possession by defendant. *Clarkson v. Stanchfield et al.*, 57 Mo. 573. But constructive possession in defendant is sufficient. *Moore v. Moore* (Cal.), 84 Pac. Rep. 90.

<sup>2</sup> *Sands v. Kagey*, 150 Ill. 109; *Louisville &c. Co. v. Berkey* (Ind.), 36 N. E. Rep. 642; *Union Pet. Co. v. Bliven Pet. Co.*, 72 Pa. St. 173. But see *Karnes v. Tanner*, 66 Pa. St. 297.

breach occurs, the action can be maintained, although the term has not yet been determined.<sup>1</sup> At common law a technical demand and distress was necessary and an actual entry on the premises by the claimant, before he could maintain the action.<sup>2</sup> But by the statute, 4 Geo. II., c. 28, which has been generally adopted in the United States, the technical common-law demand was dispensed with, and although the right to make an entry is still a necessary prerequisite to the action both in England and the United States,<sup>3</sup> the necessity of making an actual entry before bringing the action has been abolished.<sup>4</sup>

§ 526. **The action under the code** — Under the code the plaintiff is authorized by statute to recover possession alone, or possession with damages, and the omission to ask

<sup>1</sup> McGarrity v. Byington, 12 Cal. 426; King v. Edwards, 1 Montana, 285; s. c. B. & W. L. C., p. 223. But in an ejectment suit against a lessor who has entered for breach of a condition, the burden of proving the forfeiture is on the lessor, although defendant in the suit. McKnight v. Kreutz, 51 Pa. St. 232; s. c. Mor. Min. Dig., p. 87. Under the common-law action of ejectment, the plea "not guilty" would enable defendant to show that plaintiff's lessor had parted with his title since the commencement of the action. Etowah Mining Co. v. Henderson (Ala. 1900), 29 So. Rep. 7.

<sup>2</sup> Tiedeman on R. P., § 276 *et sub.*; Taylor's Land. & Ten. (7 Ed.), § 698, and cases cited.

<sup>3</sup> Plaintiff must have the right to the immediate possession at the time of the suit. Herbert v. King, 1 Mont. 475.

<sup>4</sup> Van Rensseler v. Ball, 19 N. Y. 100; Taylor's Land. & Ten., §§ 801-802-494 (7 Ed.); Tiedeman on R. P., § 277, p. 185; 2 Wash. R. P. 13; Fonda v. Sogl, 46 Barb. 123; Green v. Pettingill, 47 N. H. 375; Stearns v. Harris, 8 Allen, 598. "Ejectment lies for a coal mine or coal pit." Comyn v. Kyneto, Cro. Jac. 150; Jenkins, 313; s. c. Styled Comyn v. Wheatly, Nov. 121; M. M. D. 87. "Tin bounds, *eo nomine*, are not the subject of ejectment. They should be described as a mine lying within certain bounds called tin bounds." Doe v. Alderson, Tyrwh. & G. 543; s. c. 1 M. & W. 210; s. c. Dow. Pr. R. 701; M. M. D. 87. "Query, whether ejectment will lie for a quarry." Brown v. Chadwick, 7 Irish, C. L. 101; M. M. D. 87.



for damages indicates the election.<sup>1</sup> Where possession alone is claimed and a money demand is not alleged and a certain amount asked for, it is error for the court to admit evidence in regard to damages, and a judgment for damages would be void.<sup>2</sup> The general object of this code provision is briefly explained by Judge Bliss, in his excellent work on code pleading: "The object of the clause is not so much to authorize the recovery of damages in real actions, as the union, in one proceeding, of causes of action for the recovery of distinct parcels of land."<sup>3</sup> In prosecuting this action, whether the wrong is a single one, furnishing but one cause of action, or whether there has been a dispossession of different parcels, at different times, having no connection with each other, thus making a separate cause of action in regard to each parcel, it is not disputed that as to each cause of action, the plaintiff may claim possession, with the damage and rents spoken of, or may claim the possession alone, and prosecute the money demand by an independent action.<sup>4</sup>

<sup>1</sup> See Statutes different States.

<sup>2</sup> Bliss on Code Pleading, § 132, p. 220; *Livingston v. Tanner*, 12 Borh. 481.

<sup>3</sup> Bliss on Code Pleading, *supra*. That plaintiff owns the fee, is a good allegation of title; it is not essential to set out the source of title. *Baker v. Carrington*, 68 N. Y. S. 405.

<sup>4</sup> Bliss C. P., § 132, pp. 220-1; *Vandevort v. Gould*, 86 N. Y. 639. "Equitable relief in regard to the land in suit is sometimes and properly sought, more often to prevent injuries in the nature of waste. This is not, however, a joinder under the clause of the statute, but is either the ancillary relief which the courts sometimes give, or if the injury be a separate cause of action, it is one connected with the subject of the action, *i. e.*, the land itself." See authorities, *supra*. Under general plea, outstanding title may be shown although not connected with defendant. *Cowan v. Hatcher* (Tenn.), 59 S. W. Rep. 689. But mere trespasser cannot set it up. *Casey v. Kimmel*, 181 Ill. 154; 54 N. E. 905. An outstanding title must be one capable of enforcement by the owner. *Wilson v. Braden* (V. Va. 1900), 36 S. E. 367.

§ 527. **Complaint—Description of premises.**—In the action of ejectment the complaint must truly describe the premises claimed,<sup>1</sup> but the nature of the estate and the quantity of the plaintiff's interest are not matters necessary to be set forth in the complaint.<sup>2</sup> He has been allowed to recover an undivided interest in an estate when he alleged to be the owner of the whole,<sup>3</sup> and a mistake in the description of the premises, when the same is not material to the location of the land, will not prevent a recovery of the tract.<sup>4</sup> Generally, any description of the premises, which would enable the sheriff to definitely locate the same, would be sufficiently specific,<sup>5</sup> and in England and some of the United States, the sheriff is permitted to act under the instructions of the plaintiff, although the land is not described sufficiently definite to enable him to locate the same, without further directions, the claimant, of course, being responsible for any misdescription.<sup>6</sup> When the land is described by courses and distances with but one monument mentioned in the description, the plaintiff is confined to the bearing of the magnetic needle at the time when the action was brought and the lines must always be confined to the courses and distances and cannot be extended

<sup>1</sup> Taylor's Land. & Ten., § 704, p. 592.

<sup>2</sup> *Ante, idem.* Harrison v. Stevens, 12 Wend 170.

<sup>3</sup> Harrison v. Stevens, *supra*.

<sup>4</sup> Clark v. Clark, 7 Vt. 190, where it was held a description sufficiently definite to enable the sheriff to find the property, and properly locate same, was good.

<sup>5</sup> *Idem*; also Brooks v. Tyler, 2 Vt. 348. The strict description of premises required at common law is now relaxed and a description, in ejectment, of a tunnel or lode claim, by name, if it could be identified, is sufficient. Glazier Mt. Silver Mining Co. v. Willis, 127 U. S. 471; 32 L. C. P. Co. Ed. 172. A description sufficiently definite to enable the sheriff to locate the property, is good. Bay State Mining Co. v. Jackson, (Colo. 1900), 60 Pac. Rep. 573.

<sup>6</sup> Taylor's Land & Ten., § 704, p. 593.

beyond them.<sup>1</sup> But on the recovery of possession the plaintiff is always restricted to so much only of the land as he gave evidence of his title to, on the trial of the action.<sup>2</sup>

§ 528. **Defendant must be in possession.** — One of the main essentials to the action of ejectment, both at common law and under the code, is the actual possession of the premises claimed, by the defendant.<sup>3</sup> The plaintiff, in every instance, must allege and prove this fact, before his action can be maintained.<sup>4</sup> And not only must he show that the defendant is in possession, but he must show that he is in without the right of possession, or rather that this right is in the plaintiff alone.<sup>5</sup> In other words it must appear that the defendant is a mere trespasser upon the possession of the plaintiff and that he, or those under whom he claims, or from whom he obtained possession, entered upon the actual or constructive possession of the plaintiff.<sup>6</sup> The defendant, however, can set up any defense upon the issue thus formed, which goes to show his right to remain in possession of the premises, and defeat the rights and

<sup>1</sup> *Idem.* See, as to the relative value of courses and distances and monuments in the description of land, Tiedeman on Real Prop., § 880, p. 667; also *Vaughan v. Tate*, 64 Mo. 491; *Major v. Watson*, 78 Mo. 665; *Overton v. Devissou*, 1 Gratt. 211. A proper description contains both monuments, courses and distances and the quantity of land called for, Tiedeman, R. P., *supra*.

<sup>2</sup> *Taylor, supra*.

<sup>3</sup> *Roach v. Heffernan*, 65 Vt. 485; 27 Atl. Rep. 71.

<sup>4</sup> *Marvin v. Elliott*, 99 Mo. 616. But see, as to nature of possession, *Moore v. Moore*, 34 Pac. 90.

<sup>5</sup> Defendant may rest upon possession, unless it is without right. *Duncan v. Able*, 99 Mo. 188.

<sup>6</sup> *Bledsoe v. Simons*, 53 Mo. 305. Constructive possession by defendant will support the action. *Moore v. Moore* (Cal.), 34 Pac. Rep. 90. A deed of the whole tract, by co-tenants, is such a denial of their co-tenants' title, as to support ejectment by the latter. *Neher v. Armijo*, 9 N. M. 325; 54 Pac. Rep. 236.

claims of title made by the plaintiff.<sup>1</sup> He can show that he has held possession for the statutory period of limitation;<sup>2</sup> can set up any equitable defense going to show that he has the right to the immediate possession,<sup>3</sup> and can set up any good, outstanding title, which could be enforced against the plaintiff.<sup>4</sup> But the outstanding title must be one that could be enforced against the plaintiff, and the defendant could not set up, as an outstanding title, an existing mortgage to which he is a stranger.<sup>5</sup>

§ 529. **Proof of title.** — When the action is instituted by a lessor, no proof of title is required, for the lessee, having once recognized his lessor's title, by accepting a lease from him, is afterwards precluded from showing that he had no title at the time when the lease was granted.<sup>6</sup> But in statutory actions for the recovery of real property, when the pleadings are not controlled by the statute, the

<sup>1</sup> *Krieger v. Crocker*, 118 Mo. 581; 24 S. W. 170; *Collins v. Stocking*, 98 Mo. 290; *Shanahan v. Tomlinson* (Cal.), 36 Pac. Rep. 1009.

<sup>2</sup> *Stocker v. Greene*, 94 Mo. 280.

<sup>3</sup> *Dawson v. McLeary* (Tex. Civ. App.), 25 S. W. Rep. 973-975; *Schuster v. Schuster*, 93 Mo. 483.

<sup>4</sup> *Dawson v. McLeary supra*.

<sup>5</sup> *Hardwick v. Jones*, 65 Mo. 54. "In ejectment against two for a mining ditch, when A. was found to be in possession and B. was found to be not in possession, having previously surrendered his possession to his codefendant. Judgment going against A. alone, the right of B. is not adjudicated, and he is not precluded from afterward asserting his title, if he have any." *Burke v. Table Mt. Co.*, 12 Cal. 404; M. M. D. 89. "Defendant in ejectment for a mining claim may show a conveyance by plaintiff or plaintiff's grantor prior to the bringing of the action, to show as a defense that plaintiff has no title through the chain of title by which he claims. A naked trespasser cannot show outstanding title in a third party, except as a means of showing the want of all title in the plaintiff." *Mallett v. Uncle Sam M. Co.*, 1 Nev. 194; M. M. D. 89.

<sup>6</sup> *Taylor's Land. & Ten.*, § 706, p. 595; *Wright v. Pitt*, L. R., 12 Eq. 408; *Wilson v. Smith*, 5 Yerger (Tenn.), 379.

plaintiff is required to prove his title, and should allege facts sufficient to give him the right of possession.<sup>1</sup> The statutes and code provisions of the different States vary materially in regard to the manner of setting forth the plaintiff's title,<sup>2</sup> but some allegation of title, of the plaintiff's interest in the estate, or of his right to the possession, is required in all the States, for the spirit and purpose of the action is to try the right of title.<sup>3</sup> In some the obli-

<sup>1</sup> *Chapman v. Dougherty*, 87 Mo. 617; *Silver Creek Cement Co. v. Union Line &c. Co. (Ind.)*, 85 N. E. 125.

<sup>2</sup> Statutes different States.

<sup>3</sup> *Clarkson v. Stanchfield*, 57 Mo. 573; *Bigler v. Baker (Neb.)*, 24 L. R. A. 255; *s. c.* 58 N. W. Rep. 1026; *Landry v. Landry*, 45 La. Ann. 1118. But the rule that plaintiff must rely on strength of his own title, is not applicable to suits concerning mining claims on public land, for the legal title strictly speaking is in the government. In such an action, if the plaintiff shows prior possession, the defendant cannot justify by showing a true title to be outstanding. *Richardson v. McNulty*, 24 Cal. 339. In ejectment, to recover a claim on public land, the plaintiff in a suit in U. S. court, cannot establish his title, by proof of equities, that would constitute the defendants, in possession, trustees of the legal title for the plaintiff. Plaintiff, in such case, must recover on the legal title only, or first establish his equitable title, in the proper forum. *Lockhart v. Johnson*, 181 U. S. 515. *Foster v. Mora*, 98 U. S. 428; *Johnson v. Christian*, 128 U. S. 382; *Langdon v. Sherwood*, 124 U. S. 74. But an equitable title is a good defense, when based on the paper title. *Butler v. Carpenter*, 168 Mo. 597; *Wright v. Fort*, 126 N. C. 615; 36 S. E. 113. See, also, *Lewis v. Hamilton*, 26 Colo. 263. But see, *contra*, *Marshall v. Ladd*, 131 U. S. 87; 19 L. Ed. 153; *Halle v. Smith*, 128 Cal. 415; 60 Pac. Rep. 1082. *Cooper v. Newton*, 68 Ark. 150; 56 S. W. 867. Defendant can show a valid location in his vendor, prior to plaintiff's location, in ejectment for a mining claim, although his grantor had not contested the plaintiff's location. *Murray v. Lumber Co. (Mont. 1901)*, 68 Pac. Rep. 719. "An action of ejectment to recover mining property cannot be maintained on the ground that defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against the defendants, give plaintiff no legal title to the mine or any part thereof." *Lockhart v.*

gation of showing the true title is ignored and a formula permitted without reference to the facts of each case.<sup>1</sup> In some the statute is silent as to the pleadings,<sup>2</sup> while in some the duty of expressly showing title is required.<sup>3</sup> But the mere allegation of title is but a conclusion of law and although it is always best to plead it as an issuable fact, *i. e.*, by stating the substantial facts which go to show the title, the pleader is necessarily governed as to the manner and nature of pleading his title, by the statute and code provision of his own State.<sup>4</sup>

Johnson (U. S. S. C.), 21 Sup. Ct. Rep. 665. Prior to issuance of patent, actual possession of claim on public land is essential to support ejectment. *Valcalda v. Silver Peak Min. Co.*, 86 Fed. Rep. 90. To support ejectment against a subsequent locator a claimant on the public land must show a valid location by himself. *Lockhart v. Wills*, 9 N. M. 344; 54 Pac. Rep. 336; *Lockhart v. Johnson*, 181 U. S. 515. The citizenship of a locator of a claim upon the public land, cannot be raised in ejectment but only by the government. *Wilson v. Con. Mining Co.*, 19 Utah, 66; 56 Pac. Rep. 300; *Manuel v. Wulff*, 152 U. S. 505; 38 L. Ed. 532; *German Min. Co. v. Alexander*, 2 S. D. 557; *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 89.

<sup>1</sup> Bliss on Code Pleading, § 225.

<sup>2</sup> *Ante, idem*, § 226.

<sup>3</sup> *Ante, idem*.

<sup>4</sup> See Statutes different States. Bliss on C. P., *supra*; see *Eagen v. Delaney* (16 Cal. 86), where the plaintiff, in his proof, was held to the title pleaded. The legal title must be in plaintiff at the time the suit is brought. Plaintiff cannot recover on the weakness of defendant's title, but must rely on the strength of his own. *Krieger v. Crocker*, 118 Mo. 531. But see, *contra*, as to government claims, *Richardson v. McNulty*, 24 Cal. 339. Plaintiff cannot recover where defendant is in possession, under color of title, where plaintiff cannot show title, as he must recover on the strength of his own title and not the weakness of defendant's. *Winters v. Hainer* (Tenn.), 64 S. W. Rep. 44; *McVey v. Carr*, 159 Mo. 648; *Wilson v. Carrice*, 155 Ind. 570. Where the defendant claims title under plaintiff, the latter need not, in the first instance, show title prior to the conveyance to himself. *Worley v. Hicks* (1901), 161 Mo. 340.

§ 530. Action may be maintained on prior possession. — As before explained,<sup>1</sup> before the plaintiff can recover in an action of ejectment, he must show that he is entitled to the immediate possession of the premises. When the plaintiff, however, has been in prior possession of the land, and claims in connection therewith the fee, this raises a presumption of title, sufficient to support the action against one who has a mere naked possession alone.<sup>2</sup> But a prior possession, in order to support the action of ejectment, must have all the essential elements of an adverse possession, *i. e.*, it must be visible, notorious, continued and actual.<sup>3</sup> When the prior possession is of this nature, however, although it may be short of a statutory bar, it will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned.<sup>4</sup> But recovery on a prior possession is generally limited to cases where the defendant is a mere intruder or trespasser and does not extend to cases where he is in possession under color and claim of title.<sup>5</sup>

<sup>1</sup> See first section of this chapter.

<sup>2</sup> *Norfleet v. Russell*, 64 Mo. 176; 10 M. A. 585; *Heger v. De Graat* (N. D.), 56 N. W. Rep. 150; *Thomas v. Nantohola Marble Co.*, 58 Fed. Rep. 485.

<sup>3</sup> Mere payment of taxes and claim of ownership is not sufficient to maintain ejectment. *Greenleaf v. Brooklyn T. & C. Co.*, 141 N. Y. 395; *Lambert v. Craig*, 18 So. 701. As against one showing no better title, possession will support ejectment. *Haws v. Mining Co.*, 160 U. S. 303; *Hall v. Gallemore*, 138 Mo. 638; *Gender v. Miller*, 21 Nev. 180; *Hentig v. Peper*, 58 Kan. 788. Prior possession sufficient to support ejectment does not apply to mines located upon agricultural land. *Morton v. Copper Co.*, 26 Cal. 527; *B. & W. L. C.*, pp. 107, 172.

<sup>4</sup> *Bledsoe v. Simms*, 53 Mo. 305; *Holland v. San Antonio* (Tex. Civ. App.), 23 S. W. Rep. 756. Prior possession alone without payment of taxes will support the action as against mere trespasser. *Shanahan v. Tomlinson* (Cal.), 26 Pac. Rep. 1009.

<sup>5</sup> *Prior v. Scott*, 87 Mo. 303. A plaintiff in ejectment attacking the title of the party in possession, must show that the defendant's posses-

§ 531. **Licensee cannot maintain.** — Prior possession will support the action of ejectment, but a mere license, revocable at any time, on breach of condition, will not, as the licensee is not entitled to the possession.<sup>1</sup> If the license is in the nature of a lease, so as to vest a permanent corporeal interest in the licensee, such as to entitle him to the possession of the land, then the action can be maintained,<sup>2</sup> but this is not essentially a license, but rather a lease, for the definition of a license is a mere right given to the licensee by the owner of land to exercise some right in the land and this does not carry the possession.<sup>3</sup>

§ 532. **When lessee can deny lessor's title.** — When a lessee has accepted the possession of land from the owner, as the latter's tenant, he will, in the absence of fraud or duress, be afterwards estopped from denying his lessor's title. All that is necessary to create the estoppel on the part of the lessee is to produce the lease in evidence on the trial of the cause and the fact of the tenancy having been established, it is not even necessary to prove the execution of

sion is wrongful and the plaintiff cannot make a title by prescription. *Lambert v. Craig*, 45 L. A. Ann.; s. c. 13 So. Rep. 701. "Plaintiff in ejectment for a mining claim can rest his recovery upon prior possession, and the action does not necessarily put in issue the legal title." *Grady v. Early*, 18 Cal. 100; M. M. D. 88. "Possession of a mining claim taken without reference to mining rules, is sufficient in ejectment for the claim, as against one entering by no better title, and not in compliance with any mining rule. It is simply prior against subsequent possession. *English v. Johnson*, 17 Cal. 108; B. & W. L. C. 172; M. M. D. 88.

<sup>1</sup> *Crocker v. Fothergill*, 2 B. & Ald. 152; Mor. Min. Dig., p. 87.

<sup>2</sup> *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Karns v. Tanner*, 66 Pa. St. 297; *Beatty v. Gregory*, 17 Iowa, 109.

<sup>3</sup> *Boone v. Stover*, 66 Mo. 434. Ejectment will lie for the wrongful ouster of a tenant (of an oil well) notwithstanding the grant under the lease may have been of an incorporeal hereditament. *Karns v. Tanner*, 66 Pa. St. 297; M. M. D. 87.



the lease, for the lessee, having voluntarily taken under such deed, cannot afterward dispute its execution.<sup>1</sup> There are many matters of defense, however, which are not barred by this estoppel, and many cases in which it does not arise at all.<sup>2</sup> For instance, where the lessee has not exactly accepted the actual possession of the premises from the lessor, but the existence of the latter's title is indirectly admitted, as where the admission arises from the payment of rent or the like, the lessee always has the privilege to rebut the presumption arising from such payment, and can show that the payment was made through fraud or mistake.<sup>3</sup> In fact, the rule preventing the lessee from denying the lessor's title, is subject to many qualifications, and the late cases go to the extent of permitting him to deny the lessor's title, in all cases where he was not admitted to possession by the lessor, without proof of fraud or mistake.<sup>4</sup> But in all cases where the defense of fraud or mistake is set up, equity will investigate the circumstances of the particular case, and grant or refuse relief, as justice may require.<sup>5</sup>

<sup>1</sup> *Jackson v. Davis*, 5 Com. 123; *Taylor L. & T.*, § 707, and cases cited; *Loring v. Harmon*, 84 Mo. 123; *McKissick v. Ashby*, 98 Cal. 422; 33 Pac. Rep. 729; *Suddord v. Robinson*, 118 Neb. 286; 24 S. W. Rep. 151; *Sexton v. Corley*, 147 Ill. 269.

<sup>2</sup> *Jones v. Stone*, A. C. 122; *West Shore Mills Co. v. Edwards (Or.)*, 33 Pac. Rep. 987.

<sup>3</sup> Or he may show that his landlord holds in violation of the laws of the State, or that the title is in a third party by whom he has been evicted. *Taylor's Land. & Ten.*, § 708, p. 597 (7 Ed.); *West Shore & Co. v. Edwards*, 33 Pac. Rep. 987.

<sup>4</sup> *Taylor on Landlord & Tenant*, pp. 305, 333 and 340. "The tenant of a mine cannot set up any outstanding title or government proprietorship against his lessor." *Wilson v. Smith*, 5 Yerger (Tenn.), 379; M. M. D. 200.

<sup>5</sup> *Wiggin v. Wiggin*, 58 N. H. 235.

§ 533. **Successful plaintiff entitled to profits.**— When one has demonstrated, by the action of ejectment, that he is entitled to the possession of certain premises, he may also recover the value of the use of the premises for the time that he was wrongfully excluded from the possession.<sup>1</sup> The title of the plaintiff dates from the time when his right of entry first accrued. He could, at common law, recover *mesne profits* from any one who excluded him from possession, after his right of entry attached, and these profits could either be recovered in an action of trespass, or an action for use and occupation, if the tort is waived. But the plaintiff is entitled to recover for the use and occupation of the premises, for such time as he was wrongfully excluded from the possession, even though he may have recovered the possession without a legal action and although he may have entered into a contract for a sale of the premises to the party in possession and the latter was in possession at the time of the ouster.<sup>2</sup> A recovery of *mesne profits* in an action of ejectment is no bar to an action of trespass *quare clausum fregit*, for the former action is for the use and occupation of the premises alone, while the latter is for injuries to the premises during the same period.<sup>3</sup> But the action for use and occupation

<sup>1</sup> Including rents and profits. *Rives v. Mansfield*, 96 Mo. 394. But a judgment for rents and profits cannot go against a defendant not in possession. *La Rivere v. La Rivere*, 97 Mo. 80.

<sup>2</sup> *Taylor's Land. & Ten.*, §§ 290-302; *Tiedeman on R. P.*, §§ 645-646. Ejectment will lie on failure to pay royalty, under forfeiture clause of lease, without previous demand or re-entry by lessor. *Robinson v. Borp*, 61 N. J. L. 179; 38 Atl. Rep. 813.

<sup>3</sup> *Taylor's Land. & Ten.* (7 Ed.), § 764 *et sub.*

<sup>4</sup> *Campbell v. Rankin*, 2 Mont. 363. To be a bar, a judgment must have been rendered on the same issues. But trespass *quare clausum fregit*, like ejectment, must be based upon an actual possession or the right thereto, or the plaintiff must be in constructive possession. *Huginn v. Cunliff*, 2 Colorado, 367. See also *Gill v. Cole*, 1 Har. & J. 403.

would not lie to recover for *mesne profits* which accrued subsequent to the day of the demise, for the defendant, having been treated, in the action of ejectment, as a trespasser, the plaintiff would afterward be estopped to regard him as a tenant.<sup>1</sup>

§ 534. Same — Mesne lessee not liable therefor — Defenses. — The action for *mesne profits* may be maintained, generally, against any one wrongfully in actual possession of the land. But a sub-lessee, holding over, after the expiration of his lessee's interest, unless he has himself been guilty of a tort, by collecting rent, or other wrongful act, during the period of his holding over, cannot be held liable for *mesne profits*.<sup>2</sup> Nor can an original lessee who enters under one in possession claiming title, be held responsible in an action of trespass for *mesne profits*, after the eviction of his lessor, by a person holding the paramount title.<sup>3</sup> Any matter of defense may be set up in an action for *mesne profits* that could be legitimately introduced in an action of debt for royalty.<sup>4</sup> But the same rules of pleading govern in this, as in other matters of defense, and, generally, anything can be introduced that goes to controvert the truth of the plaintiff's allegations; to take

<sup>1</sup> Taylor's Land. & Ten. (7 Ed.), § 705 and note. However, the lessor could waive his action for *mesne profits* and recover under the statute (Statutes different States) in an action for debt, by way of a penalty for double the value thereof for the time the premises were held over. Taylor's Land. & Ten., § 710; (8 Ed.).

<sup>2</sup> Taylor's Land. & Ten., § 711, p. 601 (7 Ed.), and cases cited.

<sup>3</sup> Jones v. Clark, 20 Johns. 51; Calderwood v. Peyser, 31 Cal. 337; Douglas v. Fulda, 45 California, 492.

<sup>4</sup> Taylor's Land. & Ten., § 711, p. 601 (7 Ed.); Jackson v. Randall, 11 Johns. 405. An action to recover for *mesne profits* can generally be maintained, irrespective of the suit to recover possession of the land. O'Reilly v. Long, 25 Ind. App. 529.

away his right or reduce his cause of action.<sup>1</sup> He can show that he was not in possession at the time charged in the plaintiff's complaint,<sup>2</sup> that he was not in possession as long as charged,<sup>3</sup> or any other matter, avoiding the liability sought to be placed upon him by the plaintiff.<sup>4</sup> He can also plead part payment<sup>5</sup> and set up the statute of limitations in bar of plaintiff's right of action.<sup>6</sup> But although he can offset the value of such improvements as he was authorized by the owner to make, in an action by the latter, he cannot set up this defense when the action is brought by the devisee, for in such case he must seek his compensation from the personal representatives of the devisee;<sup>7</sup> nor could the value of improvements erected by the lessee be offset against the rents and profits, in an action by the lessor under the statute, for this defense is in its

<sup>1</sup> Bliss on Code Pleading, §§ 349-351. The defendant can interpose an equitable right or title if it negatives plaintiff's right of possession. Bliss, § 349, p. 510; *Fallett v. Heath*, 15 Wis. 601. And defendants can set up two or more defenses in their answer and support both by proof. *Bell v. Brown*, 22 California, 671. But the proof must support the title claimed. *Eagen v. DeLaney*, 16 California, 86.

<sup>2</sup> And if a defendant is out of possession he is not bound by a judgment against a codefendant in possession. *Burke v. Table Mt. Co.*, 12 California, 404.

<sup>3</sup> *Jackson v. Combs*, 7 Cow. 86.

<sup>4</sup> Bliss on Code Pl., *supra*.

<sup>5</sup> Taylor's L. & T. (7 Ed.), § 711, p. 601.

<sup>6</sup> *Idem.* Tiedeman, R. P., §§ 713-717. Abandonment is also a good defense. *Bell v. Brown*, 22 California, 671. Or an outstanding title. *Cal. Quicksilver M. Co. v. Redington*, 50 California, 160; *Mallett v. U. S. M. Co.*, 1 Nev. 194.

<sup>7</sup> Taylor's Land. & Ten., *supra*. After a judgment for plaintiff the defendant has a reasonable time to remove buildings and machinery erected by him for purposes of mining. *MacSwinney on Mines*, pp. 515-516; *Wake v. Hall*, 7 Q. B. D., 295-303. But not after he has abandoned the same. *MacSwinney, supra*; 8 App. Cas. 208; 216.

very nature equitable, and not in issue in a suit for the possession.<sup>1</sup>

§ 535. **Action lies for minerals.** — It was held in the early English cases that an action for the recovery of the possession of mines and minerals, as a part of the *solum* of the earth, could properly be maintained by the party entitled to the possession<sup>2</sup> and this doctrine has been affirmed by a long line of more recent decisions.<sup>3</sup> The right is based upon the separate ownership of the minerals, which constitute a part of the land, before their severance from the soil, and a distinct right to their possession may exist apart from the surface, since real estate, from its very nature, is susceptible of such dual ownership.<sup>4</sup> Where the mines and surface are owned by the same person they of course go as a part of the entire *solum* of the earth, and the question becomes of more importance when a separate ownership exists. The remedy extends for the recovery of open mines, as a distinct subject-matter of the action, regardless of the ownership of the surface.<sup>5</sup> But whether the action lies for mines not yet opened or undiscovered lodes was formerly a mooted question.<sup>6</sup> It

<sup>1</sup> See Statutes different States. (R. S. Mo. 1899, Sec. 2259); *Koch v. Hawkins*, 40 Mo. App. 680, and cases cited.

<sup>2</sup> *Harebottle v. Peacock*, Cro., Jac. 21; *Crocker v. Fothergill*, 2 B. & Al. 660; *Corwin v. Kyneto*, Cro. Jac. 150; *Rich v. Johnson*, 2 Str. 1142; *Port v. Turton*, 2 Wils. 172; *Rose v. Nixon*, 2 J. & W. 555; *MacSwinney*, pp. 523, 524; *Mor. Min. Dig.*, p. 87.

<sup>3</sup> *Beatty v. Gregory*, 9 Mor. Min. Rep. 284; 17 Iowa, 109; *Boone v. Stover*, 66 Mo. 484; *Mor. Min. Dig.*, *supra*; *MacSwinney on Mines*, p. 523.

<sup>4</sup> *Tiedeman on Real Property*, § 210.

<sup>5</sup> *Sayer v. Pierce*, 1 Ves., Sec. 232; *Bowser v. Colby*, 1 Ha. 114; *Dartmouth v. Spittle*, 79 W. R. 445. But see *Brown v. Chadwick*, 7 Ir. C. L. Rep. 108.

<sup>6</sup> *MacSwinney on Mines*, p. 523.

has been held, principally on account of the impossibility of enforcing the judgment of the court, that the action would not lie for the possession of unopened mines,<sup>1</sup> but where there is an instrument creating a corporeal right to the possession of unopened mines, since such a right is always susceptible of enforcement, the action can be maintained for the possession of the undiscovered ore.<sup>2</sup>

§ 536. *Same — As regards fixtures.* — Ejectment is applicable to the recovery of machinery and fixtures annexed permanently to the realty, as an incident to the recovery of the land itself;<sup>3</sup> but the action does not lie for the recovery of mere personal chattels.<sup>4</sup> Where the machinery is annexed to the realty and the ownership is the same, a recovery in ejectment carries with it the title to the machinery,<sup>5</sup> and where the plaintiff establishes his title to the realty and ownership of machinery erected thereon, an action can be maintained, on proof of his exclusion from the use and possession of the machinery.<sup>6</sup> But the plain-

<sup>1</sup> *Sayer v. Peirce*, *supra*; also *Wilkinson v. Proud*, 11 M. & W. 83; *Cole on Eject.* 91. In ejectment, to recover a mine in possession of a purchaser, who has defaulted, injunction will issue in aid of the ejectment, to prevent removal of mineral. *Williams v. Long*, 129 Cal. 239; 61 Pac. Rep. 1087.

<sup>2</sup> *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. (N.S.) 186; *MacSwiney on Mines*, p. 524. It has also been held that the action would lie for the possession of an oil lease, even though the right created was but an incorporeal hereditament. *Karns et al. v. Tower*, 65 Pa. St. 297; *s. c.* 5 Mor. Min. Rep. 289. It is a matter of some doubt, as drolly remarked by an early writer, how the sheriff would proceed to put a party in possession of such a right. *Cole on Eject.* 91.

<sup>3</sup> *Ewell on Fixtures*, p. 441.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *Adams Eject.* 347; *Ewell, supra*; *Altes v. Hinckler*, 36 Ill. 275.

<sup>6</sup> *Hill v. Hill*, 48 Pa. St. 521; *Paul v. Eldred*, 29 Pa. St. 415. "A steam engine and boilers fixed in an anthracite furnace for the manufacture of iron are part of the realty." *Roberts v. Dauphin Bank*, 19 Pa. St. 71; *M. M. D.* 105.

tiff must be entitled to the possession of the realty, if the machinery is in the nature of a fixture, before he will also be permitted to recover the machinery, and a recovery of the mineral beneath the surface would not carry with it the machinery erected on the surface, unless the plaintiff was entitled to and did recover the possession of the surface on which the machinery was erected.<sup>1</sup>

§ 537. **Equitable defenses.** — The plaintiff cannot recover in the action of ejectment, even though he may succeed in showing that the defendant has no legal right to the possession of the premises in controversy, providing the latter can show that he would have, in equity, the right to the immediate possession of the premises.<sup>2</sup> If the defendant holds an equitable lien on the land, he is entitled to the possession of the same, provided he is in possession, until his lien has been satisfied, and the plaintiff in such case could not recover until he paid to defendant the amount of his lien upon the land.<sup>3</sup> A purchaser at an administrator's sale, acquires an equitable interest in the land, as soon as he pays the purchase money, and this will constitute a sufficient defense, in an action by the grantee of the heirs of the deceased, when such party has either actual or constructive notice of the facts.<sup>4</sup> And where the plaintiff is trustee of the land in controversy and holds the

<sup>1</sup> Bullion Min. Co. v. Croessus Gold & Silver Min. Co., 2 Nev. 169; Mor. Min. Dig., p. 87.

<sup>2</sup> Baker v. Wall, 59 Mo. 265. But see, *contra*, where a trust is given a stranger to protect a wife from her husband, *ante, idem*. And the laches of plaintiff may also constitute an equitable defense. Dentertre v. Shellenbarger, 21 Neb. 507.

<sup>3</sup> Schuster v. Schuster, 98 Mo. 438; Hayden v. Stewart, 27 Mo. 286. And possession under a contract of purchase is a good defense. Tibeau v. Tibeau, 19 Mo. 78; Harris v. Winyard, 42 Mo. 568.

<sup>4</sup> Lang v. Joplin Mining & Smelting Co., 68 Mo. 422; Jones v. Manly, 58 Mo. 559.

legal title for the defendant, the latter can set up this fact as an equitable defense and ask that the title be vested in him.<sup>1</sup> But the interposition of an equitable defense does not, in any particular, change the nature of the action, and the issues are the same as before.<sup>2</sup>

<sup>1</sup> *Shroyer v. Nickell*, 55 Mo. 264 (following *Valle v. Fleming*, 29 Mo. 152).

<sup>2</sup> *Schuster v. Schuster*, *supra*; *St. L. v. Rockler & Co.*, 98 Mo. 618; 8 M. A. 577 (appendix). And where the complaint is in ejectment and asks also for an injunction, defendant can interpose his equities. *South End Min. Co. v. Tinney* (Nev.), 35 Pac. Rep. 89. "A complaint in ejectment for a mining claim, which also prays for an injunction to restrain its working, should not be dismissed, because as to the injunction prayed for it does not set forth sufficient grounds to give the court jurisdiction to grant the injunction." *McNeady v. Hyde*, 47 Cal. 482; M. M. D. 90. "In ejectment for an interest in a mining claim, defendant cannot defeat the action by showing the claim to partnership property. Rights arising out of the partnership must be asserted in equity, and cannot defeat the recovery of the legal title." *Lowe v. Alexander*, 15 Cal. 297; M. M. D. 88. An equitable title cannot prevail as against a *bona fide* purchaser of the legal title. *Sengfelder v. Hill*, 21 Wash. 371; 58 Pac. Rep. 250. But see *Pope v. Nichols*, 61 Kan. 230; 59 Pac. Rep. 257; and *contra*, *Carter v. Ruddy*, 166 U. S. 493; 41 L. Ed. 1090.



## CHAPTER VII.

### FORCIBLE ENTRY AND DETAINER.

- SECTION** 538. History and nature of action.  
539. Forcible entry distinguished from unlawful detainer.  
540. Jurisdiction.  
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543. Who can maintain action.  
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545. Possession essential.  
546. As to personalty — Incorporeal rights.  
547. When defendant is in under contract.  
548. When indictment will lie.

§ 538. **History and nature of the action.** — In treating of the action of forcible entry and detainer, although the statutes of many of the States make a distinction between this and the summary process for the recovery of land, the general nature and effect of the two actions is similar and they will be here treated under one head. The action of forcible entry and detainer was originally a criminal proceeding, and an indictment will still lie at common law against one who obtains possession of land by force or violence and without authority of law,<sup>1</sup> provided the entry is accompanied by a public breach of the peace, and on conviction the court will award restitution of the premises the same as a judge in a civil case.<sup>2</sup> The legislatures of the different States, however, viewing the restitution of the property as of more importance than the conviction of the

<sup>1</sup> Bouvier's Law Dict., p. 599; Sta. 8 Henry VI., Ch. 9, was enacted in 1429; 3 Eng. Sta. at L. 121 is the beginning of civil remedy; 9 Enc. Pl. & Pr., p. 23.

<sup>2</sup> *Fuhr v. Dean*, 26 Mo. 116.

wrongdoer, have enacted statutes changing the nature of the action from a public to a private wrong, and regard is had rather to the enforcement of the right than the punishment for the wrong, although in form the action is governed by substantially the same rules of law as before.<sup>1</sup> Forcible entry and detainer is regarded by the courts as a purely statutory remedy, however, and the statutory proceedings differ so materially from the common law action that there is very little of similarity between them.<sup>2</sup> The gist of the action is that possession was taken by force and the question of title or right of possession is not generally involved in the issues,<sup>3</sup> the matter to be determined being the right of the plaintiff to be restored to the possession which he has been forcibly deprived of.<sup>4</sup>

§ 539. **Forcible entry distinguished from unlawful detainer.**—There are material differences between the statutory actions of forcible entry and unlawful detainer, but as the two are similar in form we will consider them together. As the names imply, force is a necessary element in the former, while it does not exist in the latter.<sup>5</sup> Forcible entry, as defined by the statute, consists in either an entry upon the land by force, threats or violence;<sup>6</sup> or by entering peaceably and then turning out the party in possession by force, threats or violence.<sup>7</sup> An unlawful detainer may arise from willfully holding over any land, tenement, or other possession, without force, after the

<sup>1</sup> Wade Am. Min. Laws, p. 133; Statutes different States.

<sup>2</sup> The common law affords no civil remedy to the party dispossessed. *Fuhr v. Dean*, 26 Mo. 116.

<sup>3</sup> *Harvie v. Turner*, 46 Mo. 444; *Belle v. Cardwell*, 33 *Id.* 84.

<sup>4</sup> *Bell v. Cowan*, 34 Mo. 251.

<sup>5</sup> *Spaulding v. Mayhall*, 27 Mo. 377.

<sup>6</sup> R. S. Mo. 1899, Sec. 3320.

<sup>7</sup> *Ante, idem.*

termination of the tenancy;<sup>1</sup> or in wrongfully obtaining possession of the same in the first instance, without force, and unlawfully detaining possession.<sup>2</sup> A wrongful detention of the possession is necessary before either action can be maintained, and as a refusal to deliver the same is necessary on the part of the party wrongfully detaining the possession, the party entitled to the same, before the action can be maintained, must first make a demand that he be restored to the possession.<sup>3</sup> Especially is a demand necessary in the case of a forcible entry and such cases of unlawful detainer as consist in a wrongful disseisin in the first instance.<sup>4</sup> A wrongful detainer is necessary in order to justify the action of forcible entry and detainer, but a forcible entry is inconsistent with the action of unlawful detainer.<sup>5</sup> Possession in plaintiff is necessary to support a forcible entry and detainer, but the owner of land can maintain the action of unlawful detainer, although he has never been in actual possession of the land, providing his tenant is the party wrongfully detaining the possession, for the reason that the possession of the tenant is the constructive possession of the landlord.<sup>6</sup> But unlawful detainer will not lie against the owner of the land, unless he has wrongfully disseised his tenant, for where possession is obtained without force, there can be no one better entitled to the possession than the owner;<sup>7</sup> in forcible entry and detainer, however, the question of

<sup>1</sup> *Holmes v. Stewart*, 26 Mo. 529; *Espen v. Hinchcliff*, 131 Ill. 468.

<sup>2</sup> *Ante, idem.* Statutes of Mo. 1889 § 5088 *et sub.*

<sup>3</sup> *Drehman v. Steffel*, 41 Mo. 184. But if the premises had been let for a fixed time no demand is necessary for possession. *Alexander v. Westcott*, 37 Mo. 108

<sup>4</sup> *Young v. Smith*, 28 Mo. 65.

<sup>5</sup> *Michan v. Walsh*, 6 Mo. 346; *Dennison v. Smith*, 26 Mo. 487.

<sup>6</sup> *Kauleen v. Tillman*, 69 Mo. 510.

<sup>7</sup> *Michon v. Walsh*, 6 Mo. 346.

ownership is not material, for the law forbids a forcible entry, with or without title.<sup>1</sup> Further distinctions will appear from a perusal of this chapter.

§ 540. *Jurisdiction.*—The English statute, 15 Rich. II., c. 2, is the beginning of the jurisdiction of justices of the peace in actions of this nature,<sup>2</sup> and as originally empowered, the officer could go to the premises where a forcible entry had occurred and inflict summary punishment upon the offender, but the courts soon held that they were without jurisdiction, without a regular action before the magistrate, by complaint.<sup>3</sup> The jurisdiction is still left, in most States in the Union, with justices or similar inferior and local courts, where the remedy can be speedily applied and the procedure is regulated by statute.<sup>4</sup> But the organic law of some States prevents justices from trying real estate actions and if the forcible entry and detainer statutes confer such jurisdiction, in the face of the constitution, they would be void.<sup>5</sup> Many States provide for the

<sup>1</sup> *Gibson v. Tong*, 29 Mo. 133. Forcible entry and detainer will lie against licensee, after revocation of the license. *Dunstedter v. Dunstedter*, 77 Ill. 580; 9 Enc. Pl. & Pr. 54. But the action will not lie against a mere trespasser. *Merrill v. Forbes*, 23 Cal. 379. "When the entry is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offense is a forcible entry and detainer. But when the original entry is lawful, and the subsequent holding forcible and tortious the offense is an unlawful detainer. So where a defendant enters peaceably under a lease, but keeps forcible possession after the expiration of his lease, he is guilty of a forcible entry and detainer." *Pullen v. Booney*, 1 South. 125.

<sup>2</sup> *Sutton's Case*, 6 Mod. 91; 2 Ld. Raym. 1005.

<sup>3</sup> *Ante, idem.* 2 Eng. St. at L. 339; 3 Eng. St. at L. 121; 9 Enc. Pl. & Pr. 29.

<sup>4</sup> In some States, county courts try the action. *People v. Kern Co.*, 45 Cal. 679. Any description of the premises is usually sufficient if they could be identified. *Bell v. Killcrease*, 11 Ala. 685; *Castro v. Gill*, 5 Cal. 40.

<sup>5</sup> *Webb v. Carlisle*, 65 Ala. 313.

dismissal of the action, when title becomes involved,<sup>1</sup> or some authorize the case disposed of, when title is involved, by a certification of the cause to a court with jurisdiction to try title.<sup>2</sup>

§ 541. **Same — Value does not affect.** — Since the action is to restore one unlawfully dispossessed to his rightful possession and the rent or damages for the detention are usually but incidental to the restoration of the possession, even in the case of courts whose jurisdiction is limited in amount, the *value* of the plaintiff's injuries will not, generally, affect the jurisdiction,<sup>3</sup> and compensatory damages are recoverable in this action, even in justice's courts without limit as to amount.<sup>4</sup>

§ 542. **What force necessary.** — Under the older cases, to constitute forcible entry and detainer there must have been such a show of force or violence, or such threats and menaces as to cause reasonable apprehension of personal injury to the party standing in defense of the possession.<sup>5</sup> Anything less than force sufficient to excite a fear of personal danger was regarded as a mere trespass and not a forcible entry, such as contemplated by the statute.<sup>6</sup> The statutes of the different States, however,

<sup>1</sup> *Comstock v. Cole*, 28 Neb. 470; *Myers v. Konig*, 5 Neb. 419.

<sup>2</sup> *Henderson v. Allen*, 23 Cal. 519; *Klopfer v. Keller*, 1 Colo. 410; *Murray v. Burris*, 6 Dakota, 170; *Williams v. Walt*, 2 S. Dak. 210; *Witz v. Haines*, 43 Ind. 470; *Jordan v. Walker*, 56 Iowa, 686; *Little v. Grady*, 38 Ark. 584; Mo. R. S. 1899, Sec. 3391; *Schwarer v. Christophel*, 72 Mo. App. 116.

<sup>3</sup> *Small v. Gwinn*, 6 Cal. 447; *Wade's Amer. Min. Law*, 283.

<sup>4</sup> *Silvey v. Summer*, 61 Mo. 253.

<sup>5</sup> *Willard v. Warren*, 17 Wend. 257; *Gray v. Finch*, 28 Conn. 495; *Penn v. Robison*, Addis. 14.

<sup>6</sup> *Taylor's Land. & Ten.*, § 787, p. 669.

have been construed differently by the courts, as to the amount of force necessary to make a case of forcible entry, and though some of the State courts still hold with the older authorities that the entry must be made with a show of actual force, which could not arise by implication from a mere trespass,<sup>1</sup> it is held in some of the States that force is still a necessary element of the action, but the degree of force held requisite in the older cases is modified to the extent that it is not necessary that such a degree of violence should be used as to inspire terror to the party defending the possession;<sup>2</sup> while a third class of cases hold that the entry contemplated by the statute is any entry without the consent of the party in possession;<sup>3</sup> — “an entry against the will of the occupant, whether by stealth and strategy, or by force.” But although the decisions are somewhat inharmonious as to the degree of force necessary to maintain the action, when a case has once been brought within the statute, the defendant cannot excuse himself by showing a legal right of entry, or that he went upon the premises to enforce a lawful claim, for having violated the provision of the statute he could not avoid the penalty by showing an absence of intent.<sup>4</sup>

§ 543. Who can maintain the action. — The remedy was so narrowed under the English statute that no one

<sup>1</sup> See *Gray v. Finch*, *supra*; *Scarlet v. Laramque*, 5 Cal. 63; *Shaw v. Hoffman*, 21 Mich. 151 (overruling *Lutz v. Miles*, 16 *Id.* 456).

<sup>2</sup> This is not the rule in Michigan. *Shaw v. Hoffman*, 21 Mich. 151.

<sup>3</sup> The Missouri rule. *Dennison v. Smith*, 26 Mo. 487; *Meecham v. McKay*, 37 Cal. 154.

<sup>4</sup> *Taylor's Land. & Ten.*, p. 670. No demand or notice to quit is generally required when the entry was wrongful or illegal. *Farncomb v. Stern*, 18 Colo. 279; *Stillman v. Falls*, 134 Ill. 332. Demand and notice is generally required before the action will lie for breach of the conditions of a lease. *Smith v. Hill*, 63 Cal. 61; *Howland v. White*, 48 Ill. App. 236; *Lean v. Spratt*, 19 Fla. 97; 9 Enc. Pl. & Pr. 56.

could maintain the action of forcible entry and detainer, unless he was seized of an estate of freehold, or for a term of years.<sup>1</sup> Under this procedure the wrong-doer who entered without right and dispossessed the quiet occupant, was protected in his wrongful act by the court, and the latter was himself without remedy for the recovery of possession, unless he was seized of an estate for years or something better. The pernicious consequences resulting from such a narrow construction of the statute are apparent. The remedy is extended by statute in the United States and the right to maintain the action is given not only to those possessed of the freehold, or an estate for years, but it will also lie in favor of any one entitled to the possession of the premises.<sup>2</sup> The right is, therefore, co-extensive with the right of possession, and anyone can maintain the action who is in the actual and peaceable possession of the land at the time of the forcible entry,<sup>3</sup> or in the constructive possession at the time of the forcible detention.<sup>4</sup> Some of the State courts have even gone to the extent of holding that a party is entitled to recover, if in actual possession of the premises, no matter how the possession was acquired.<sup>5</sup> As this would give the right to a trespasser as against the legal owner of the premises, it is certainly carrying the doctrine too far, and, however sound it may

<sup>1</sup> Taylor's Land. & Ten., § 786; 1 Hawk. P. C. C. 64, note.

<sup>2</sup> See Statutes different States. *Dudley v. Lee*, 39 Ill. 339; *Pollock v. Schafer*, 46 Cal. 270; *McCartney v. Alderson*, 45 Mo. 35. It is not necessary to set out the estate or title of the plaintiff, but an allegation of possession is usually necessary. *Holland v. Green*, 62 Cal. 67; *Brown v. Feagins*, 37 Neb. 256; *Spurck v. Forsythe*, 40 Ill. 438; *Nicrosi v. Phillips*, 91 Ala. 299; 9 Enc. Pl. & Pr. 59. The action can be brought by lessee and his subtenants, whether lessee is in possession or not. *Espen v. Hinchliff*, 131 Ill. 468; 9 Enc. Pl. & Pr. 54.

<sup>3</sup> Taylor's Land. & Ten., p. 672 (7 Ed.).

<sup>4</sup> *Ante, idem.* *Dudley v. Lee, supra.*

<sup>5</sup> *King v. St. L. Gas L. Co.*, 34 Mo. 34.

he, the law would certainly be otherwise where the remedy is limited by statute to the party "entitled to the premises," which is the case in some States, for under such statutes the plaintiff must show a possession under claim of title, even though invalid.<sup>1</sup> But the remedy is given by the statute only to the party entitled to the possession and the right to maintain the action would not pass to his assignee.<sup>2</sup> There is a contrariety of opinion in regard to the right of a tenant at will to maintain the action,<sup>3</sup> but the weight of authority is perhaps to the effect that the action will not lie on the part of a tenant strictly at will, and the owner of the premises would be the proper party to maintain the action for a dispossession of the tenant.<sup>4</sup> Neither can the action be maintained by a mere licensee, for he is not, as such, entitled to the possession.<sup>5</sup>

§ 544. **Same — Miner operating under "register" cannot maintain action.** — Where the operator of a mine, or mining claim, is working under a "mining register," in jurisdictions where such operations and the owner's rules are held to create the relation of licensor and licensee only, the

<sup>1</sup> "Defendant cannot raise question of title when he is in by disseisin." *May v. Lockett*, 54 Mo. 437; *Kingman v. Abington*, 56 Mo. 46.

<sup>2</sup> *Dudley v. Lee*, *supra*.

<sup>3</sup> *May v. Lockett*, 54 Mo. 437; *Kingman et al. v. Abington et al.*, 56 Mo. 46.

<sup>4</sup> *Commonwealth v. Biglow*, 3 Pick. 31; *McCartney v. Alderson*, 45 Mo. 35.

<sup>5</sup> *Desloge et al. v. Pearce et al.*, 38 Mo. 588; *Foundry & Machine Co. v. Cole*, 130 Mo. 1; *Lunsford v. Lead Co.*, 54 Mo. 426; *Boone v. Stover*, 66 Mo. 430; *Rochester v. Gate City Co.*, 86 Mo. App. 442. The successful plaintiff is entitled to restitution not only as against the defendant, but also as against one to whom he has transferred the possession, after suit filed. *Miller v. White*, 80 Ill. 530; *Danforth v. Stratton*, 77 Me. 200; 9 Enc. Pl. & Pr. 73.



operator or party licensee cannot maintain the action for a wrongful entry by the owner, for the reason that by his contract he has established his relation as that of licensee, simply, with only such rights as follow this relation, and as a right of possession is not incident to a license, one enjoying same cannot maintain a possessory action.<sup>1</sup> Nor is it probable that this result would be changed by the additional consideration that the *right of possession* is not involved in the action,<sup>2</sup> as the injury is, essentially, one to the *possession*, and since a bare licensee does not have possession, it is difficult to conceive how he could sustain damage by any injury thereto.

§ 545. **Possession essential — Title not in issue.** — As possession alone is essential to the maintenance of the action, the title of the plaintiff is not in issue in an action of forcible entry and detainer except so far as is necessary to bring his case within the statute.<sup>3</sup> He is bound, however, to set forth his title so far as to show that the land

<sup>1</sup> *Lowe v. Smelting Co.*, 89 Mo. App. 680; *Rochester v. Mining Co.*, 86 *Idem*, 442; *Lunsford v. Lead Co.*, 54 Mo. 426; *Chenowitch v. Granby Co.*, 74 Mo. 173; *Foundry v. Cole*, 130 Mo. 1; *Zinc Co. v. Freeman*, 75 Mo. App. 524. But see *Fuhr v. Dean*, 26 Mo. 116; *Rynd v. Oil Co.*, 63 Pa. St. 397; *Union Pet. Co. v. Bliven Co.*, 72 Pa. St. 173. Nor does this result deprive the miner of any legal right, but only adjudges his rights, as he himself, by his voluntary contract, has established their legal status. *Lowe v. Smelting Co.*, *supra*.

<sup>2</sup> *Lorimer v. Lewis*, 1 Morris (Iowa), 258; *Dupuy v. Williams*, 26 Cal. 309; *Mitchell v. Hagood*, 6 Cal. 148; *Wade Amer. Min. Law*, p. 233; *Rochester v. Mining Company*, 86 Mo. App. 447. A miner mining on mining lots under the Missouri statute and rules and regulations posted thereunder, being a mere licensee and without possession, cannot maintain forcible entry and detainer. *Lowe v. American Zinc & Smelting Co.*, 89 Mo. App. 680. See, however, as to action of trespass by second licensee, against licensee holding over after revocation of prior license, *Hicks v. Swift Cr. M. Co.*, 31 South. Rep. 947.

<sup>3</sup> *Mitchell v. Hagood*, 6 Cal. 148.

he claims and the case he makes comes within the provisions of the statute and to this extent the defendant can controvert the title of the plaintiff.<sup>1</sup> The owner of the land cannot, by showing that he held the title, prove his possession of the premises;<sup>2</sup> but it must appear that he was actually in peaceable possession of the property at the time of the alleged entry,<sup>3</sup> and the fact of possession must appear independent of the fact of ownership, before the action can be maintained, and proof of possession at a time long anterior to the time of entry, is not sufficient, but possession must be shown at the time of the entry.<sup>4</sup> It is also essential to the maintenance of the action, to show that the defendant was in possession at the time the action was brought.<sup>5</sup> Where these facts appear, however, together with a forcible entry, it is not competent for the defendant to set up, as matter of defense, the superiority of his title over that of the plaintiff,<sup>6</sup> for this defense could only be taken advantage of in an action of ejectment, where the question of title is in issue, and it is immaterial what the allegations of title may be on the part of the plaintiff, for if he succeeds in showing a peaceable possession at the time of the entry, and such an estate as would entitle him to the enjoyment thereof,<sup>7</sup> this is sufficient

<sup>1</sup> Taylor's Land. & Ten., § 790, where the different statutes are referred to.

<sup>2</sup> Treat v. Stuart, 5 Cal. 118; Jarvis v. Hamilton, 16 Wis. 574. But where the complainant is a mere intruder, see Warren v. Ritter, 11 Mo. 354.

<sup>3</sup> Rex v. Willson, 8 J. R. 357; Taylor's L. & T., *supra*.

<sup>4</sup> Kimmell v. Frazier, 49 Ill. App. 462.

<sup>5</sup> Orrick v. Pub. Schools, 32 Mo. 315; Blumthol v. Waugh, 33 *Id.* 181.

<sup>6</sup> Beeler v. Cardwell, 33 Mo. 84; Harvie v. Turner, 46 *Id.* 444. Plaintiff's possession, however, should be open and visible and not a mere stealthy, or scrambling possession. Keen v. Schweigler, 70 Mo. App. 409.

<sup>7</sup> "The issue to be tried is whether the plaintiff was lawfully, *i. e.*,

to enable him to maintain the action, although he may fail to prove the title alleged in his complaint.<sup>1</sup>

§ 546. As to personalty — Incorporeal rights. — The statutes of forcible entry and detainer confine the remedy to disturbances of the possession of real property alone, and the remedy does not apply to a forcible conversion of personal property either by civil or criminal procedure.<sup>2</sup> The language of the criminal statute defining the offense is as follows: "Every person, who shall take or keep possession of any *real property*, by actual force or violence, without the authority of law, \* \* \* shall be deemed guilty of a forcible entry and detainer."<sup>3</sup> A forcible possession of personal property is clearly beyond the definition given by the statute, and *trespass de bonis asportatis*, or replevin, under the code, would be the proper remedy for a forcible conversion for this species of property. The law of fixtures is frequently invoked to determine whether or

peaceably, in possession of the premises sought to be recovered, and the defendant unlawfully entered, the right of entry, etc., is not involved." *Beeler v. Cardwell*, *supra*.

<sup>1</sup> *People v. Van Nostrand*, 9 Wend. 50. All that need appear is that the plaintiff has been ousted from his possession of the premises and that the defendant is in the actual possession thereof. *Belt v. Cowan*, 84 Mo. 251. But a prospector, who had not been in the possession for several months prior to defendant's entry, could not maintain the action. *Laird v. Waterford*, 50 Cal. 315. Possession under contract of purchase is a good defense. *Hall v. Jackson*, 77 Iowa, 201; 9 Enc. Pl. & Pr. 66. A renewal clause in a lease, at the option of lessee, is a good defense to a suit in unlawful detainer by the lessor, after end of term, where all covenants have been complied with. *Bard v. Jones*, 96 Ill. App. 370. Title in the defendant or a third party is not a good defense. *Kimmel v. Frazier*, 49 Ill. App. 462; *Kelly v. Andrew*, 3 Colo. App. 122; *Jenkins v. Jeffrey*, 2 Wyo. 669; *Giddings v. '76 Land & C. Co.*, 83 Cal. 96; *Knowles v. Ogletree*, 96 Ala. 555; 9 Enc. Pl. & Pr., p. 65.

<sup>2</sup> *State v. Brinkerhoff*, 44 Mo. App. 169.

<sup>3</sup> See Statutes. R. S. Mo. 1889, Sec. 5088.

not the action would lie in regard to this class of property. If the property is, in contemplation of law, a fixture; if it is annexed to the freehold, and the removal would result in injury to the land, the action can generally be maintained.<sup>1</sup> Thus it has been held in California, that where defendants entered without authority and took possession of a quartz mill, which plaintiff was working under a lease, and after appropriating the product of the day's work in the amalgamating pans, retained possession of the same, against plaintiff's protest, the facts brought the case within the purview of the statute, and the defendants were guilty of forcible entry and detainer.<sup>2</sup> But an allegation of a forcible invasion of real property is not maintained, by evidence that the defendant entered upon mining lots and took forcible possession of an engine and ore crusher, which could be moved without material injury to the realty, for this constitutes no disturbance to the possession of the owner of the lots.<sup>3</sup> Neither will the action lie for the forcible invasion of an incorporeal right.

<sup>1</sup> Ewell on Fixtures, 2-8, and cases cited.

<sup>2</sup> *Scarlett v. Lamarque*, 5 Cal. 68; *Fogarty v. Kelly*, 24 Cal. 319; *Wade's Amer. Min. Law*, p. 288. "S. was in possession of a quartz mill under a lease; the mill had been run until one or two o'clock in the morning, when the employees of the plaintiff closed up and retired to rest in the mill. Before daylight, and while the hands were actually sleeping in the mill, and the products of the last day's work were still in the amalgamating tubes, the defendants — some five or six in number — entered the mill, took possession, commenced tearing down the stamps, under pretense of making repairs, and retained possession against repeated demands and protest of the plaintiff and his employees: *Held*, that these facts constituted sufficient evidence of force to maintain the action of forcible entry." *Scarlett v. Lamarque*, 5 Cal. 68. (See facts of this case as stated by the court in *Fogarty v. Kelly*, 24 *Id.* 319.) *Mor. Min. Dig.*, p. 109.

<sup>3</sup> *State v. Brinkerhoff*, 44 Mo. App. 169. And such property is generally held personalty. *Hays v. N. Y. Min. Co.*, 2 Colo. 273. But see *Merritt v. Judd*, 14 Cal. 59.

A person can exercise his right to an easement, by any means in his power, so long as he does not lay himself liable to criminal prosecution, and forcible entry and detainer cannot be maintained against him, for an easement is an incorporeal right, upon which no forcible entry can in fact be made.<sup>1</sup>

§ 547. **When defendant is in under contract.**—We have heretofore considered the rights of the parties to maintain an action of forcible entry and detainer, both where the entry of the defendant was without authority and where he entered with the consent of the landowner and forcibly detains the possession. Where a lessee wrongfully detains the possession after the expiration of his lease, unlawful detainer is the proper remedy for the landlord to avail himself of.<sup>2</sup> We will now consider the rights of the parties where the defendant's entry was under an executory contract. Where the entry is made under an executory contract of purchase, by the terms of which he is, upon a failure to make any of the payments, to surrender the immediate possession to the owner, the action of unlawful detainer will not lie against him on a failure to surrender the premises, although he has defaulted in a payment at the time agreed upon.<sup>3</sup> And in no case can the action be maintained, where the defendant has been in uninterrupted possession for three whole years since the

<sup>1</sup> *Moirs v. Sparks*, 2 South. 513; *Taylor's Land. & Ten.*, p. 673. Personality cannot be the subject of the action. *Gillman v. Sigman*, 29 Cal. 638; *Hoffman v. Reichart*, 31 Ill. App. 558; 9 Enc. Pl. & Pr., p. 62. But a tramway may be recovered under a forcible entry and detainer action. *James v. Miles*, 54 Ark. 460.

<sup>2</sup> *Young v. Ingle*, 14 Mo. 426; *Spaulding v. Mayhall*, 27 *Id.* 377; *Taylor's Land. & Ten.* (7 Ed.), Secs. 787-789 *et sub.*, and cases cited.

<sup>3</sup> Nor could the vendee maintain the action against his vendor for the possession of the premises at the time agreed upon. *Wood v. Dalton*, 26 Mo. 581.

date of his first default.<sup>1</sup> The authorities are divided on this proposition, however, and it would, in fact, seem to be the more reasonable doctrine and more in harmony with the intention of the legislature, to permit the owner, in such a case, to maintain the action of unlawful detainer. Many of our laws are but the opinion of the worthy gentlemen of our higher courts and they are frequently reached through channels of subtle reasoning. Why would it not be as reasonable to consider the detention, after the default, as a wrongful entry, as well as to consider the original entry rightful? There is apparently no reason for the distinction. But it is well settled that where the defendant enters under a lease, and fails to perform the conditions of a contract which he agreed to perform, the action of unlawful detainer can be maintained, for the case is then within the definition of the statute relating to a lessee, holding over after the expiration of his term.<sup>2</sup>

§ 548. When indictment will lie. — Under some statutes of forcible entry and detainer, a criminal prosecution is also provided for, when the acts of the wrong-doer are sufficiently flagrant to sustain an indictment for the offense.<sup>3</sup>

<sup>1</sup> *Grant v. White*, 42 Mo. 285; *Gillet v. Matthews*, 45 *Id.* 307.

<sup>2</sup> *Young v. Smith*, 28 Mo. 65. So, where the premises are let for a fixed time, the action will lie for a holding over, without any demand. *Alexander v. Westcott*, 37 Mo. 108. And defendant could not, after expiration of his lease, depend upon the existence of a pending contract for new lease, for this would give an action for breach of such contract, but could not confer a right of possession to the premises. *Grant v. White*, 42 Mo. 285; *Young v. Smith*, 28 *Id.* 65; *Finney v. Cist*, 34 *Id.* 303; *Arnot v. Alexander*, 44 *Id.* 25; *Tiefenbrum v. Tiefenbrum*, 65 Mo. App. 253. A set-off or counter-claim cannot be pleaded in a forcible entry and detainer suit. *Carmack v. Drum* (Wash. 1902), 67 Pac. Rep. 808.

<sup>3</sup> See Statutes.

An indictment was also sustainable at common law for a forcible entry and detainer, but before the indictment will lie the entry must have been accompanied by a public breach of the peace.<sup>1</sup> The object of the statute is to prevent breaches of the peace, by punishing persons who by actual violence, or by threats of immediate violence, accompanied by the display of a dangerous or deadly weapon, should dispossess those in actual occupation of real property and unless these facts appear both in the indictment and from the evidence, a conviction cannot be obtained.<sup>2</sup> Evidence that the defendant entered upon the premises with a stick in his hand and forbade the party entitled to the possession from re-entering on the land, does not show such taking or keeping possession of the premises by actual force or violence, or such putting in fear with a dangerous or deadly weapon as will warrant a conviction on an information for forcible entry and detainer.<sup>3</sup> Nor would an indictment for a forcible invasion of the possession of real property be sustained, by evidence that the defendants entered upon mining lots and took forcible possession of an engine and one crusher, for such invasion does not constitute an injury to the possession of the lots.<sup>4</sup> But if facts appear, sufficient to bring the acts of the defendant within the letter of the statute, the defendant cannot justify the force used by showing that the title to the premises was in him-

<sup>1</sup> Taylor's Land. & Ten., § 794; *Rex v. Wilson*, 8 T. R. 850; *King v. Lloyd*, Cald. 415.

<sup>2</sup> See, for a case where the evidence was insufficient to sustain the indictment. *Lewis v. Schween*, 15 M. A. 842.

<sup>3</sup> *Lewis v. Schween*, 15 M. A., cited *supra*. The defendant may depend on his three years prior possession or traverse the allegation as to the force used by him. *People v. Rinkle*, 9 Johns. 147, 148; *Taylor's Land. & Ten.*, § 794.

<sup>4</sup> *State v. Brinkerhoff*, 44 Mo. App. 169. But for a violation of the civil statute see *Fogarty v. Kelly*, 24 Cal. 319; *Scarlett v. Loramque*, 5 *Id.* 68.

self,<sup>1</sup> although he can controvert the allegations of title on the part of the prosecutor, in order to show that he had no right of action under the statute,<sup>2</sup> and where the defendant is convicted, the court will award restitution of the property in addition to the penalty of the statute.<sup>3</sup>

<sup>1</sup> *People v. Bickett*, 8 Cowan, 226.

<sup>2</sup> *Taylor's Land. & Ten.*, § 794; p. 679 (7 Ed.).

<sup>3</sup> *People v. Anthony*, 40 Johns. 198; *Ford's Case*, Cro. Jac. 151; *Taylor's Land. & Ten.*, *supra*. "If a party had the right of entry upon a mining claim, his right is not vitiated by his forcible or fraudulent exercise of such right, and the party whom he ousted cannot be restored by ejectment. *Depuy v. Williams*, 26 Cal. 309; M. M. D. 108.



## CHAPTER VIII.

### ACTION OF TRESPASS.

#### SECTION 549. Definition and nature of action.

- 550. Right of possession necessary.
- 551. Trespass and case distinguished.
- 552. As regards lessor and lessee.
- 553. Same — For removal of fixtures.
- 554. When licensee can maintain action.
- 555. For injury to freehold — Who may maintain.
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- 558. For a continuing nuisance.
- 559. For miscellaneous injuries — Disturbance of easement.
- 560. Lessee wrongfully holding over.
- 561. Trespass by corporations.
- 562. Removal of mineral — Specific cases of trespass.

§ 549. **Definition and nature of action.** — The right to the possession of property, of either species, accompanies the ownership, and every act which deprives the owner of this right, when unauthorized, or any infringement upon the same, becomes a trespass. Trespass, therefore, is any illegal entry upon, or immediate injury to the real or personal property of the owner.<sup>1</sup> “Thus an entry upon land without claim or color of title, under a void lease, or an executory contract; or a continuance there after a request to leave; or even going upon another’s land and taking away one’s own property, is a trespass.”<sup>2</sup> The gist of the

<sup>1</sup> Cooley on Torts, pp. 49–50.

<sup>2</sup> Taylor’s Land. & Ten., § 774, p. 661, and cases cited. “One who has the exclusive right to dig turf and peat in a parcel of ground may maintain trespass; *aliter*, if he had merely a right of common. *Wilson v. Mackreth*, 8 Burr. 124; M. M. D. 878. Trespass and not case lies for the digging of pits in land in the possession of the plaintiff. *Thornton v. Austen*, cited 1 Ld. Ray. 188; M. M. D. 878. “To maintain trespass,

action consists in the injury done to the property, and it is immaterial what interest or motive may have actuated the wrong-doer, for any unlawful injury to property, if of a forcible nature, amounts to a trespass, although the party causing the injury may not have intended to commit trespass.<sup>1</sup> As the ownership of land includes not only the surface of the soil, but everything above and beneath the surface, the trespass may either pertain to an erection on the surface, or consist of an unlawful taking or injury to property beneath the surface.<sup>2</sup> And the action can be maintained by any person entitled to the exclusive possession of the property, whether such person is the owner of the property or not.<sup>3</sup> But it will not lie for injuries to incorporeal property, such as franchises, rights of way, etc., for as such property is of an intangible nature, it could not be affected by any substance, and no injury thereto by force could result.<sup>4</sup>

*quare clausum*, the plaintiffs must have actual or constructive possession of the *locus in quo* at the date of the alleged trespasses." *Huginin v. McCundiff*, 2 Colorado, 367. "In an action of trespass upon land (mining claim on public domain) it is only necessary for the plaintiff to prove a rightful possession in himself; it is not incumbent on him to establish any title beyond that." *Rogers v. Cooney*, 7 Nev. 213; M. M. D. 378. A petition should allege the date of the trespass or it will be bad, on demurrer. *Glenn v. Garrison*, 17 N. J. L. 1; *Kendall v. Bay State Brick Co.*, 125 Mass. 532; 21 Enc. Pl. & Pr., p. 811. In pleading trespass by an adjoining mine owner, if there is a question as to the location of the dividing line, the extent of the alleged invasion by the defendant should be specifically set forth. *Rico-Aspen Con. Mining Co. v. Enterprise Mining Co.*, 56 Fed. Rep. 131; But see *Glacier Mt. Co. v. Willis*, 127 U. S. 472.

<sup>1</sup> *Zorn v. Hooke*, 75 Hun, 235; 58 N. Y. L. R. 658; *Miller v. Shenandoah & Co.*, 38 W. Va. 538.

<sup>2</sup> *Tiedeman on Real Prop.*, § 10, p. 11.

<sup>3</sup> *Taylor's L. & T.*, § 772; *Galveston & Co. v. Rheiner* (Tex. Civ. App.), 25 S. W. 971. But see *Hampton v. Massey*, 53 Mo. App. 501; *Wilson v. Holey & Co.*, 153 U. S. 39.

<sup>4</sup> *Taylor's Land & Ten.*, § 784, p. 666 (7 Ed.).

§ 550. **Right of possession necessary.**—To maintain the action of trespass for injury to personal property it is necessary for the plaintiff to be in possession of the property, or entitled to the immediate possession at the time the injury was committed.<sup>1</sup> One who only has a reversionary interest in the property cannot generally maintain trespass, for in suing for injury to his reversion, a reversioner must show a permanent injury to his reversionary interest, and if the injury only affects the possessory interest, the one in possession is the proper party to maintain the action.<sup>2</sup> For an injury to a personal chattel, however, the general owner may maintain the action notwithstanding the chattel may be in the possession of another, for the possession of such property in legal contemplation accompanies the ownership.<sup>3</sup> But for an injury to such property in the hands of a bailee, he, of course, is the proper party to maintain the action, for having acquired a special property in the chattel, he alone is entitled to the possession, and can maintain or defend all actions relating thereto, except as to those who have a superior title to his own.<sup>4</sup> The possession, or right of possession, which the law contemplates, is not partial but exclusive, and hence one tenant in common cannot maintain the action against his

<sup>1</sup> This is the English rule. Taylor, § 773. But see *Cramer v. Grose-close*, 53 M. A. 648; *Bailey v. Siegel Gas &c. Co.*, 54 *Id.* 50.

<sup>2</sup> Unless the possession is adverse this rule does not apply in this country. Taylor's *Land & Ten.*, *supra*. Mere possession of mining claim will support action. *Rogers v. Cooney*, 7 Nev. 213.

<sup>3</sup> *Allen v. Craig*, 10 Wend. 849. "Where iron land is entered by a trespasser and ore taken for the use of a neighboring furnace to such extent and under such claim of right as constitutes such mining a possession against the true owner, such true owner may recover for the original ouster, but not for the continuing trespass until he has first recovered possession." *West v. Lanier*, 9 Humph. (Tenn.) 762; M. M. D. 378.

<sup>4</sup> *Schouler's Bailments & Carriers*, § 110, p. 122.

cotenant, unless the action of his cotenant would amount to a severance of the tenancy.<sup>1</sup> But whenever the actual possession of the land cannot be shown, the possessor of the legal title is considered to have the possession necessary to maintain trespass.<sup>2</sup>

§ 551. **Trespass and case distinguished.**—Injuries resulting from case and trespass are in many instances so similar that the common law distinctions between the two actions becomes of practical importance in determining the remedy for the plaintiff to pursue. He is liable to be non-suited should he bring the wrong action,<sup>3</sup> or confronted by a motion to compel him to elect if he should declare on both.<sup>4</sup> In trespass the injury results immediately from the wrongful act,<sup>5</sup> while in case it is but consequential.<sup>6</sup> It is very important in every case to determine whether

<sup>1</sup> Taylor's Land. & Ten., § 765 *et sub.* In all actions by cotenants, all should join. *Douty v. Bird*, 60 Pa. St. 48. And a trespass by one cotenant cannot be justified under a license from only part of his cotenants. *McCurran v. McConnell*, 7 Cal. 152.

<sup>2</sup> *Baker v. King*, 18 Pa. St. 138. But not if there is an adverse claim. *Schoenberger v. Baker*, 22 Pa. St. 398; *Barclay v. Tuleke*, 2 Mart. 59. Cotenants must generally join in actions for trespass to the common property. *Winters v. McGhee* (Tenn.), 8 Sneed, 128; *Low v. Munford*, 14 Johns. (N. Y.) 426; 21 Enc. Pl. & Pr. 805. But see, as to action by one or two or more lessees, *Wood v. Montgomery*, 60 Ala. 500. In trespass *de bonis asportatis* possession must be proved and this gives *prima facie* right to property, but ownership, either special or general, should also be established. *Covington v. Simpson*, 52 Atl. Rep. 349. A mere licensee to mine has no such interest in the land or mineral in place as to enable him to maintain the action of trespass for removal of mineral. *Arnold v. Bennett*, 92 Mo. App. 156.

<sup>3</sup> Taylor's Land & Ten., § 779, p. 664.

<sup>4</sup> Mo. Code Civil Pro. R. S. 1899. This would be the proper method to remedy such pleading in many States.

<sup>5</sup> *Le Roy v. Wright*, 4 Saw. 535; *Atterson v. Stevens*, 1 Taunt. 182 (an action for removal of brick earth by lessee).

<sup>6</sup> *Howard v. Banks*, 2 Burr. 1118 (a case of consequential damage to colliery; also *Scott v. Boy*, 3 Md. 432.)

the wrongful act is the direct or consequential cause of the injury complained of, and the doctrine of approximate and remote cause here comes in.<sup>1</sup> The following is the test given by one eminent authority to determine this question: "If the unlawful force caused the injury before it was spent, the injury must be deemed direct, but if after the unlawful force was spent, the injury occurred as a collateral or secondary consequence, it is to be considered indirect."<sup>2</sup> In statutory actions, where damages are given for the injury, and the form of action is not prescribed by the statute, case and not trespass is the proper remedy.<sup>3</sup> But where the statute provides a remedy without abrogating the common-law right of action, the injured party may seek relief by the statutory remedy, and also avail himself of his common-law right of action.<sup>4</sup>

§ 552. **As regards lessor and lessee.** — In the case of a tenancy at will, the party holding the legal title is deemed to be in constructive possession of the land and can properly maintain the action of trespass;<sup>5</sup> but in all other cases

<sup>1</sup> See Cooley on Torts, p. 514 *et sub.*

<sup>2</sup> Cooley on Torts, p. 514, and cases cited.

<sup>3</sup> Taylor's Land. & Ten., § 780, and cases cited. "Action on the case cannot be maintained by one having the legal title to land against another who enters, cuts timber, quarries stone and commits like trespasses." *Robertson v. Rodes*, 18 B. M. (Ky.) 325; Mor. Min. Dig. 378.

<sup>4</sup> *Ante, idem.* "When act complained of is under legal process case is the remedy; when it is not under color of process the remedy is trespass. Taylor L. & T., § 782. Unless such joinder is authorized by statute, trespass *vi et armis* and case cannot be joined. *Gulford v. Kendall*, 42 Ala. 615; 21 Enc. Pl. & Pr. 800. Nor can trespass and trover. *Ante, idem.* *Haines v. Beach*, 90 Mich. 563; *Mecklin v. Deming*, 111 Ala. 159; *Dalson v. Bradbury*, 50 Ill. 82. But in Maryland and Vermont such joinder is authorized. *Barr v. White*, 22 Md. 259; *Benton v. Beattie*, 68 Vt. 186.

<sup>5</sup> *Starr v. Jackson*, 11 Mass. 519. But see *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. (N. S.) 186, where it is held a tenant at will can bring the action. McL., p. 533.

the person who is in actual possession of the premises at the time the injury occurred, although his possession is subordinate to another, is the proper party to maintain the action.<sup>1</sup> Trespass is a disturbance of the possessory right only, and the party affected by such disturbance is of course the proper party to maintain the action.<sup>2</sup> The entry of a lessor on the rightful possession of his lessee is as much a trespass as though made by any other person, and unless he reserved to himself a certain portion of the premises, he is responsible to the lessee for any encroachment upon or interference with his possession of the premises.<sup>3</sup> Where he reserves, however, a certain portion of the premises, or any buildings erected on the premises demised, or reserves the right to use the whole of the demised premises for certain purposes, the lessee in turn can be held responsible for any interference with this right on the part of the lessor.<sup>4</sup> During the continuance of the tenancy two actions may be maintained for an injury to the estate; one by the lessee for the disturbance of his possessory rights and one by the lessor for the injury to his reversion.<sup>5</sup> But after the termination of the tenancy, the lessor may enter upon the premises at any time, and all

<sup>1</sup> Cooley on Torts, p. 384 and cases cited. *Smith v. Price*, 42 Ill. 399; *MacSwinney on Mines*, p. 533 and cases cited.

<sup>2</sup> *Ante, idem.* So in the case of copyhold lands, the tenant in possession is the party to maintain an action for injuries from mining coal by an adjoining mine owner. *Lewis v. Branthwaite*, 2 B. & Ad. 437.

<sup>3</sup> *MacSwinney on Mines*, p. 533 *et sub.*; *Keyes v. Powell*, 2 E. & B. 132. And see, as to lessor's liability to third parties, *Dundas v. Muhlenberg*, 35 Pa. 351.

<sup>4</sup> *Jordan v. Staples*, 57 Me. 352. But as to the lessee's rights see *Taylor's Land. & Ten.*, § 776, p. 662.

<sup>5</sup> *Taylor's Land. & Ten.*, § 764 *et sub.* Case is the proper remedy of reversioner. *Taylor*, §§ 783-784.

those who are found there without authority, are, and can be regarded by him as trespassers.<sup>1</sup>

§ 553. **Same — For removal of fixtures.** — The lessor can maintain the action of trespass against his lessee, during the continuance of the lease, if the latter, for any reason, removes fixtures from the freehold which should not have been removed by him.<sup>2</sup> But the action *quare clausum fregit* will not lie against a lessee, during the continuance of the lease, where he wrongfully removes fixtures, under color of the law of fixtures, which were connected to the freehold by himself while he was in under the lease, or were demised to him together with the rest of the premises.<sup>3</sup> And after the severance of the fixtures, if the lessee reduced the same to his possession, the right of property would entitle him to the continued right of possession, and the action of trespass *de bonis asportatis* would lie any time after the severance against anyone who interfered with the lessee's right of possession.<sup>4</sup> But the lessee must first have the right of property in the fixtures before the removal would entitle

<sup>1</sup> Cooley on Torts, p. 385 and cases cited. For action by reversioner for extraction of coal, see *Rain v. Alderson*, 6 Scott, 691; *MacSwinney*, p. 538. A lessor who wrongfully authorizes his lessees to trespass upon an adjoining owner and remove mineral, is himself liable for the mineral so taken. *Donovan v. Con. Coal Co.*, 187 Ill. 28; 58 N. E. Rep. 290. Lessee can maintain action. *Strahlberg v. Jones*, *supra*. Or the lessor either. *Bobb v. Syenite Granite Co.*, 41 Mo. App. 642.

<sup>2</sup> *Farrant v. Thompson*, 5 B. & A. 826.

<sup>3</sup> *Taylor's Land. & Ten.*, § 770, p. 658 (7 Ed.). But where there is nothing in the lease to prevent the removal of trade fixtures, as mining machinery, the lessee has a reasonable time to remove same after the termination of the tenancy. *Sumner v. Bramilaw*, 84 L. J. Q. B. 130; *Desloge v. Pearce*, 38 Mo. 588; *Rallestor v. New*, 4 Kay & J. 640. But see, where tenancy terminates by lessee's own act, *Storer v. Hunter*, 3 B. & C. 368; *Mor. Min. Dig.* 201.

<sup>4</sup> *Taylor's Land. & Ten.*, *supra*.

him to the possession, and if he is not the real owner of the same, under the law of fixtures, the mere fact that he had severed them from the freehold, would not entitle him to maintain trespass against the true owner, for a subsequent removal of the same,<sup>1</sup> and although he is entitled to enter upon the premises, after the determination of the lease for the purpose of removing implements,<sup>2</sup> yet he is not entitled to enter on the premises after the termination of the tenancy, for the purpose of removing fixtures left there by himself, for the right of property in the fixtures does not give him the right of re-entry, for the purpose of removing the same, and if he does enter for this purpose, as his entry is wrongful under the law, the lessor can maintain the action of trespass against him for such entry.<sup>3</sup>

§ 554. When licensee may maintain action. — As against a mere wrong-doer, a party in possession under a

<sup>1</sup> *Ante, idem.* And there are authorities that the tenant can only exercise his right of removal in any case during the tenancy. *Ewell on Fixtures*, 138-139. Although some cases hold the contrary. *Id.* 139-140. But in order to remove lessee must have complied with all conditions precedent. *Ewell on Fixtures*, 155-166. And the right of removal is subject to special agreement. *Id.* 149-166.

<sup>2</sup> *Taylor's L. & T.*, § 770, and cases cited.

<sup>3</sup> *Taylor Land. & Ten.*, § 770, p. 658; *Ewell on Fixtures*, pp. 138-139; *Davis v. Moss*, 38 Pa. St. 346; *Stockwell v. Marks*, 17 Me. 453; *Moore v. Smith*, 24 Ill. 513; *Marshall v. Lloyd*, 2 M. & W. 450. And such, perhaps, is the weight of authority. The law held fixtures a gift in reversion, when not removed during term. *Poole's Case*, 1 Salk. 368; *s. c.* *Holt*, 65. And where the term is terminated by lessee's own act, this rule would perhaps still obtain. *Storer v. Hunter*, 3 B. & C. 368; 5 Dow. & Ry. 240; *Mor. Min. Dig.*, p. 201. But in the case of mining machinery, in the absence of contract, it is subject to exception. *Desloge v. Pearce*, 38 Mo. 588; *Storer v. Hunter, supra*; *Rallston v. New*, 4 K. & J. 640; 34 L. J. Q. B. 180; *Ewell on Fixtures*, 139-140.



parol license can maintain trespass.<sup>1</sup> This right in a licensee has been sustained on the ground that a party in possession, even though without title, has superior rights to a mere wrong-doer;<sup>2</sup> and although it is a legal presumption akin to fiction to recognize a right of possession for any purpose, in a mere licensee, since possession is not an incident to a mere license,<sup>3</sup> this presumption of a right has been so far recognized on the part of a licensee, that if he can show a color of a right to a mine or vein and acts of ownership as to any part of the minerals, the law, as against a stranger, will presume his right of property in the minerals for the purpose of sustaining an action of trespass,<sup>4</sup> and a party mining under a contract for a lease has been treated as so far in possession as to enable him to maintain the action.<sup>5</sup> But this legal presumption of a right,<sup>6</sup> which, like all presumptions, rather shows the absence of the right, cannot avail a licensee as against the owner of the land, in case of a dispossession by the latter, notwithstanding it will support an action against a wrong-doer, for in the case of the owner, the licensee is not aided by any presumption of a right where none exists, and he is held not to be entitled to the possession.<sup>7</sup>

<sup>1</sup> *Harper v. Charlesworth*, 4 B. & C. 574. But see, *contra*, *Freer v. Stotenburr*, 2 Abb. App. 189; reversing 36 Barb. 641.

<sup>2</sup> *Taylor's Land & Ten.*, § 772, p. 659 (7 Ed.).

<sup>3</sup> *Lockwood v. Lunsford*, 56 Mo. 68 (a leading case on mining license); *Riddle v. Brown*, 20 Ala. 412; *Glaniger v. Coal Co.*, 55 Pa. St. 9; *Carr v. Benson*, L. R. 3 Ch. App. 524; *Desloge v. Pearce*, 38 Mo. 588-599.

<sup>4</sup> *Taylor v. Parry*, 1 Scott N. R. 576; *Wied v. Holt*, 9 M. & W. 672; *Low Moor Co. v. Stanley Co.*, 38 L. T. 486; *MacSwinney on Mines*, p. 532.

<sup>5</sup> *Davis v. Shepherd*, 1 Ch. 410-420; *Thew v. Wingate*, 10 B. & S. 721.

<sup>6</sup> *MacSwinney on Mines*, p. 532, and authorities cited above.

<sup>7</sup> *Fuhr v. Dean*, 26 Mo. 116, and cases cited. Second licensee may maintain trespass against prior licensee, after revocation, for continuance in possession by licensee. *Hicks v. Swift Cr. M. Co.*, 81 South. Rep.

§ 555. **For injury to freehold — Who may maintain.** For injuries to real estate, the action of waste, which has already been discussed, furnishes the most complete remedy on the part of the owner of the land, as against the tenant of the particular estate; but where the injury occurs by an outsider, trespass is the action usually resorted to for such an injury, and the action of the owner for injury to the freehold is no bar to an action by the tenant.<sup>1</sup> An absolute right of property is not necessary in order to maintain the action; <sup>2</sup> actual possession is sufficient against one who cannot show a better title, and a mere licensee, while in possession of the land, may maintain the action against a wrong-doer.<sup>3</sup> The party having the legal title can treat as intruders all persons going upon the land, except such as may be authorized by law to go there; <sup>4</sup> but

347. Party in employ of licensee, who commits acts that would otherwise be a trespass, such as cutting of timber, etc., cannot be treated as a trespasser, before license revoked. *Smith v. Morse*, 75 N. Y. S. 126; 70 App. Div. 318. But, as to status after license revoked, see *Lockwood v. Lunsford*, 56 Mo. 68; *Lunsford v. Lead Co.*, 54 Mo. 426.

<sup>1</sup> *Taylor's Land & Ten.*, § 764, p. 654 (7 Ed.); *Id.*, § 771, p. 659.

<sup>2</sup> *Cochran v. Whitesides*, 34 Mo. 417.

<sup>3</sup> *Harper v. Charlesworth*, 4 B. & C. 574. "Courts of equity will not ordinarily interfere to enjoin the commission of a threatened trespass to real property, unless the trespass be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coals and the like. The jurisdiction of the court in such cases is asserted for the preservation of the property pending proceedings at law for the determination of the title." *LeRoy v. Wright*, 4 Saw. 585; *Mor. Min. Dig.* 332. "A party in possession of a ditch and the water incident to the ditch, may maintain an action against trespassers, although the legal title to the ditch be outstanding." *Barkley v. Tieleke*, 2 Mont. 59; M. M. D. 378. "Claim for damages in trespass, quarrying and taking away asphaltum, is assignable, and the assignee may sue in his own name under section 4 of the practice act." *More v. Massini*, 32 Cal. 590; M. M. D. 381.

<sup>4</sup> And one having the legal title has possession sufficient to maintain the action. *Crenshaw v. Ullman*, 113 Mo. 633.

where the owner has been deprived of the possession he must first be restored to the possession by ejectment or re-entry before he can maintain the action of trespass for *mesne profits*.<sup>1</sup> Having recovered possession, however, if he showed a right of possession at the time the defendant entered, he is then considered as having been in possession according to his right and can recover *mesne profits* from that time.<sup>2</sup> But one who obtained possession through force cannot maintain the action against the legal owner; and although such party may have had a legal right of entry at the time, he may still be held criminally responsible by the party in possession, but the action of trespass would not lie against him.<sup>3</sup>

§ 556. Same — For wrongfully cutting timber. — In the ordinary mining lease there is generally a provision allowing the lessee to cut such timber as may be necessary for his mining operations, and where the timber is not excepted, he would be given this right, even though the

<sup>1</sup> *Smith v. Wunderlich*, 70 Ill. 426.

<sup>2</sup> *Crenshaw v. Ullman*, 118 Mo. 633, *supra*. "If the owner of land have the actual possession by having entered thereon with the intention to possess it, and whilst so possessed another enters and commits trespasses, such as cutting timber, quarrying stone, etc., the only remedy is by action of trespass, *vi et armis*. If there be no actual possession, it does not follow that the action on the case lies." *Robertson v. Rodes*, 13 B. M. (Ky.) 325; M. M. D. 378.

<sup>3</sup> In the absence of statute, trespass to realty must be brought in the county where the real estate trespassed upon is situated. *Doulson v. Mathews*, 4 T. R. 503; *Bennett v. McIntire*, 121 Ind. 231; *Meehan v. Edwards*, 92 Ky. 574; *Livingston v. Jefferson*, 1 Brock (U. S.), 203; 21 Enc. Pl. and Pr. 792. Trespass to realty can only be brought by one in possession when the trespass occurred. *Robertson v. Cleveland & Aurora Mineral Land Co.*, 70 Mo. App. 262; *Bobb v. Syenite Granite Co.*, 41 Mo. App. 642; *Strahlburg v. Jones*, 78 Cal. 381; *McClelland v. Hurd*, 21 Colo. 197; *Stahl v. Grover*, 80 Wis. 650; 21 Enc. Pl. & Pr. 803.

lease was silent on the subject.<sup>1</sup> Where timber is excepted in the lease, however, the land over which it grows is also excepted, and the lessor has the right to enter and take away the timber.<sup>2</sup> The lessee cannot maintain an action for injury to timber when the same is excepted in the lease, for he then has no interest in such timber;<sup>3</sup> but the lessor is entitled to maintain his action of trespass *de bonis asportatis* for a loss of such timber, either against a stranger, or the lessee himself.<sup>4</sup> And where the injury is done by a stranger, and there is no exception made in the lease as to growing timber, both the lessor and lessee may maintain actions against the wrong-doer for their respective losses, and one action is no bar to the other.<sup>5</sup> Where the exception only extends to the underwood growing upon the land demised, such exception does not include the land upon which it grows,<sup>6</sup> and while the lessee is using the land for mining purposes, he may maintain an action for any disturbance of this right, and so can the owner of the underwood for any injury to the same, either by the lessee or a stranger.<sup>7</sup> But where excepted timber is cut by the lessee, or a greater quantity is taken than is necessary, such timber belongs to the party having the next estate of inheritance, and an action may be maintained by him for any conversion of same.<sup>8</sup>

<sup>1</sup> See as to covenants, B. & W. L. C., p. 432. But see, as to waste by cutting timber under mining lease, *Sander's Case*, Coke Lit. 5, Fol. 12.

<sup>2</sup> *Pomfret v. Ricroft*, 1 Saund. 322; *Taylor's Land. & Ten.*, § 771, p. 658.

<sup>3</sup> *Rolls v. Rock*, 2 Selw. N. P. 1287; cited, *Taylor's L. & T.*, § 771, p. 659.

<sup>4</sup> *Taylor's L. & T.*, *supra*; Co. Lit. 57.

<sup>5</sup> *Clark v. Pywell*, 1 Saund. 319; *Taylor's L. & T.*, p. 659, § 771.

<sup>6</sup> *Lagh v. Heald*, 1 B. & Ad. 622; *Taylor's L. & T.*, *supra*.

<sup>7</sup> *Lagh v. Heald*, *supra*.

<sup>8</sup> *Clap v. Draper*, 4 Mass. 266. "The lease of coal mines does not carry with it the right to fell timber on the land for the use of the mines."

§ 557. Same — For diverting water-course. — The owner of land has a perfect right to drain the same of surface water and no action will lie against him if it be allowed to flow over adjoining land, through natural channels.<sup>1</sup> He can use such means as may be necessary to empty the water into a natural stream, and if the volume of such stream is increased so as to cause damage to the riparian owners below, they are without remedy, for they can prevent an overflow by the erection of barriers, or by other suitable means.<sup>2</sup> But in draining his land of surface water the landowner has no right to direct the flow of water upon adjoining land, either by diverting a water-course or by the construction of a drain or ditch.<sup>3</sup> For no one has the right to construct an artificial water-course upon the land of another,<sup>4</sup> and where a water-course is diverted so as to flow over the land of another, the party diverting the water-course is

*Darcy v. Askwith*, Hob. 284; *s. c.* Hutt. 19; M. M. D. 375. Plaintiff in possession, under color of title, can maintain action of trespass against trespasser cutting timber. *Hall v. Deaton*, 68 S. W. Rep. 672.

<sup>1</sup> Tiedeman on Real Prop., § 615, p. 479; *Ogburn v. Connor*, 46 Cal. 346.

<sup>2</sup> *Greeley v. Maine & c. Ry. Co.*, 53 Me. 200; *Goodale v. Tuttle*, 29 N. Y. 459.

<sup>3</sup> Tiedeman on Real Property, *supra*. "A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which have been diverted to their injury by defendants, sets forth a sufficient cause of action." *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323; M. M. D. 406. "For the diversion of water, defendants are jointly and severally liable, and the granting of separate trials is discretionary with the court." *Townsley v. Hornbuckle*, 2 Mont. 580; M. M. D. 406. "In an action for diverting water from the plaintiff's ditch, where both parties claimed in part the waters of the same stream: *Held*, that defendant was not liable for deficiency of water in plaintiff's ditch, unless defendant was diverting more water than he was entitled to, at the precise time that such deficiency existed." *Brown v. Smith*, 10 Cal. 508; M. M. D. 406.

<sup>4</sup> Tiedeman on R. P., § 616, p. 480.

liable to the owner of such land for the damage occasioned by his wrongful act.<sup>1</sup> And where a water-course is diverted upon adjoining land, either by the creation of a barrier, or by the construction of a drain or ditch, the adjoining landowner does not acquire an easement in the water, although he may have permitted the diversion,<sup>2</sup> and he cannot compel its perpetual maintenance, no matter what injury he may suffer from its discontinuance.<sup>3</sup> But, although the one who creates the artificial stream may stop or divert the same at pleasure, he cannot maliciously foul the stream to the detriment of the riparian owners below, and if he does, he is liable in damages for the injury occasioned by such wrongful act.<sup>4</sup>

§ 558. For a continuing nuisance. — As a continuing nuisance is an injury to the party in possession such person can maintain the action of trespass for the continuance of the nuisance, even though it was erected on the land be-

<sup>1</sup> *Jones v. Hanover*, 55 Mo. 462. But if the water is emptied into a natural stream they are without remedy. *Miller v. Louback*, 47 Pa. St. 154.

<sup>2</sup> *Tiedeman on R. P.*, § 616, *supra*.

<sup>3</sup> *Ante, idem.* *Saunders v. Newman*, 1 B. & Ald. 258.

<sup>4</sup> *Tiedeman R. P.* 615 and 616, *supra*; *Dickinson v. Canal Co.*, 7 Exch. 300; *Luther v. Minnesimmet Co.*, 9 Cush. 171; *Henson v. McCue*, 42 Cal. 308. See as to a reasonable use of water for mining purposes, *Union Min. Co. v. Dongberg*, 2 Saw. 450. See, as to damage for diversion, *Donald v. Bear River Co.*, 15 Cal. 145; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 333; *Brown v. Smith*, 10 Cal. 508. "Where water from coal mines had been permitted for more than sixty years to pass through a covered drain, forming an artificial underground water-course: *Held*, that the proprietor of mills who had made use of such water (for less than twenty years) could not maintain an action against a person through whose land such mine drain (sough) passed in its course for the diversion of the water, as he was under no obligation to permit it to run through his land; although such party claims no right to such water or water-course through or from the mine-owner." *Wood v. Waud*, 8 Ex. 748; *M. M. D.* 407.

fore he came into possession of the same,<sup>1</sup> and the action can be maintained either against the party who erected the nuisance or against the occupant who allows the nuisance to continue, for every continuance of the same is a fresh nuisance.<sup>2</sup> But if the nuisance is a public nuisance, the only person who can abate it is one who suffers a special grievance not felt by the public generally, and in such case it must obstruct or in some way interfere with the exercise of a legal right, for the interests of a community are not to be subverted to carry out the caprice of a particular individual.<sup>3</sup> It is therefore necessary to seek the ordinary legal remedy in such cases, and before resorting to extreme measures the party responsible for the nuisance should be notified of its existence and requested to remove it.<sup>4</sup> Unless the owner of real estate erected the nuisance, he will not be liable as such after a demise of the real estate, upon which the nuisance was erected;<sup>5</sup> but where the nuisance was erected by him, he will be liable if the same continues, although he

<sup>1</sup> *Thompson v. Gibson*, 7 M. & W. 466.

<sup>2</sup> *Taylor's L. & T.*, § 778, p. 664 (7 Ed.); *Thompson v. Gibson*, *supra*. "The alienee of a person who erected a nuisance is liable for its continuance after a request to abate it." *Bonner v. Melborn*, 7 Ga. 296. "Burning bricks on a man's own ground so as to be offensive to a neighbor: *Held*, to be a nuisance and restrained by injunction." *Walter v. Selfe*, 4 De G. & S. 815; M. M. D. 249. "A party who is maintaining a nuisance, but was not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action may lie for that purpose, unless it appear he had knowledge of its hurtful character; where the extent of the nuisance is increased by such party, the rule is otherwise." *Grisby v. Clear Lake W. W. Co.*, 40 Cal. 396; M. M. D. 249.

<sup>3</sup> *Cooley on Torts*, pp. 49 and 50, and cases cited. An individual cannot recover for a nuisance affecting the public generally. *Grisby v. Clear Lake W. W. Co.*, 40 Cal. 396; *Mor. Min. Dig.* 251.

<sup>4</sup> *Cooley on Torts*, *supra*. As to necessity for notice to abate, see *Grisby v. Clear Lake W. W. Co.*, *supra*.

<sup>5</sup> *Taylor's L. & T.*, p. 664, § 778.

may have demised the land to another.<sup>1</sup> The owner is also liable where the ordinary use of the premises, for the purpose for which they were leased, would constitute a nuisance, or where the same results from a breach on his part of a covenant in the demise;<sup>2</sup> but otherwise the party in possession is liable for the continuance of a nuisance.<sup>3</sup>

§ 559. For miscellaneous injuries — Disturbance of easements. — The action of case is the appropriate remedy for the recovery of damages for injuries to all classes of incorporeal rights and property formerly discussed under the head of mining easements. The action would lie for the recovery of damages for the obstruction of a private way;<sup>4</sup> for the disturbance of an easement or privilege over

<sup>1</sup> *Ante, idem*, citing *King v. Pedley*, 1 Ad. & E. 822; *Payne v. Rogers*, 2 H. Bl. 849.

<sup>2</sup> *King v. Pedley*, 1 Ad. & E. 822.

<sup>3</sup> *Cheetham v. Hamson*, 4 T. R. 318. See, as to liability of owner for blasting, *Scott v. Bay*, 3 Md. 481; *contra, Marvin v. Brewster Iron Co.*, 55 N. Y. 538. For fouling stream, *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Little Schuylkill Co. v. Richards*, 57 Pa. St. 142; obstruction of highway, *Iveson v. Moor*, 12 Mod. 262; *Mor. Min. Dig.*, p. 249; diversion of water, *Parker v. Kilham*, 8 Cal. 77; *Stiles v. Laird*, 5 Id. 120; and see generally as to abatement and damages, *Roberts v. Rose*, 35 L. J. Ex. 62; L. R. 1 Ex. 82; *Mor. Min. Dig.* 249. "If a quarry be carried on in such a manner as to result in a nuisance to adjoining landowners, in the absence of a defense in the nature of a presumed grant or easement, the owner must answer in damages." *Scott v. Bay*, 3 Md. 481; *M. M. D.* 248. "A mine owner cannot be restrained from blasting in the night time, as is usual in the mines, because it disturbs the sleep and thus affects the health of the owner of the surface, and his family, or diminishes the value of his estate." *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322; *M. M. D.* 248. "The exercise of a right to mine, reserved in a grant, cannot be complained of because it creates a nuisance to the owner of the surface." *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322; *M. M. D.* 248. Where thousands of trespasses have occurred and it is questionable if they will be stopped, an injunction should issue, to prevent a multiplicity of suits. *Blondell v. Gas Co.*, 89 Md. 782; 46 L. R. A. 187.

<sup>4</sup> *Mellor v. Spateman*, 1 Saund. 346; *Yard v. Ford*, 2 Saund. 173.



another's land;<sup>1</sup> for interfering with the right to use a sink or wash place in another's land<sup>2</sup> and for any wrong in regard to incorporeal property, whether the injury result from mere *nonfeasance* or from some overt act on the part of the wrong-doer.<sup>3</sup> Case is also the proper remedy for injuries to real property by the reversioner, where the land is in the possession of another at the time of the commission of the wrongful act, for the injury results immediately to the party in possession and consequently to the party having the reversion.<sup>4</sup> For instance, the action of trespass would lie on the part of the tenant for an injury to his possessory right, resulting from the erection of a nuisance on the premises and while the reversioner would also have an action for the injury resulting to the property from the erection of the nuisance, case and trespass would be the proper remedy for him to recover damages for the same.<sup>5</sup> It would also be the appropriate remedy for dangerous excavations, in undermining a house;<sup>6</sup> for excavating in such a manner as to interfere with the plaintiff's right of lateral support,<sup>7</sup> and for all other similar injuries to incorporeal property or easements known to the law of real property.<sup>8</sup>

<sup>1</sup> *Wilson v. Smith*, 10 Wend. 324; *Mainwarring v. Giles*, 5 D. & A. 361.

<sup>2</sup> *Mainwarring v. Giles*, *supra*; also *Hemlins v. Shipman*, 5 B. & C. 221.

<sup>3</sup> *Taylor's L. & T.* (7 Ed.), § 784, p. 666.

<sup>4</sup> *Taylor's L. & T.*, § 783, p. 666.

<sup>5</sup> *Taylor's L. & T.*, 782-783 and cases cited. Case is the proper remedy for drowning of mine caused by *removal of pillars* from adjoining land. *Firmstone v. Wheeley*, 2 Daw. & L. 203. So as to *consequential damage* to colliery. *Howard v. Banks*, 2 Burr. 1113. *Slandering mine*, *Paul v. Halferty*, 68 Pa. St. 46; and *blasting in adjacent mine*, *Scott v. Bay*, 3 Md. 482.

<sup>6</sup> *Smith v. Martin*, 2 Saund. 397.

<sup>7</sup> *Wyatt v. Harrison*, 3 B. & Ad. 871.

<sup>8</sup> For additional miscellaneous cases of which trespass on the case is the proper remedy, the reader is referred to *Taylor's Land. & Ten.*, §§

§ 560. **Lessee wrongfully holding over.** — After the surrender or termination of a lease, either by forfeiture or from lapse of time, the lessee is a trespasser if he remains in possession of the property after notice to quit the same,<sup>1</sup> and for any appropriation of mineral or other property belonging to the owner of the land, whether it is annexed to the freehold, or is of a personal nature, the action of trespass *de bonis asportatis* will lie on the part of the owner.<sup>2</sup> The same rule obtains after the revocation of a license by the licensor, and in sections where mining is carried on under "mining registers," by which those who conduct the mining operations acquire only the privilege of a license, litigation frequently arises in regard to the ownership of mineral, after revocation of the license.<sup>3</sup> As to such mineral as has been removed, both parties are entitled to their per cent,<sup>4</sup> and, as before explained, where there was an absolute sale of the mineral in the ground, with a license to remove the same, the ownership of the minerals could not be subsequently disturbed by a revocation of the license to remove it.<sup>5</sup> But where the licensee does not possess a right of property in the minerals, if he

783, 784, p. 666 (7 Ed.). "After a trespass in breaking through barriers the flow of water is only consequential; the continued flow is not a continuing trespass, and the plaintiff cannot recover further damages after a verdict in a suit for breaking the barriers, and damages ensuing therefrom." *Clegg v. Dearden*, 12 Q. B. 576; M. M. D. 418.

<sup>1</sup> This rule has been held to apply in Missouri, to a licensee holding over, after the termination of his license. *Lockwood v. Lunsford*, 56 Mo. 68.

<sup>2</sup> *Lockwood v. Lunsford*, *supra*; *Taylor's L. & T.*, § 767, pp. 655-656 (7 Ed.).

<sup>3</sup> *DesLoge v. Pearce*, 38 Mo. 598; *Lockwood v. Lunsford*, 56 *Id.* 68; *Rochester v. Mining Co.*, 86 Mo. App. 447.

<sup>4</sup> *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Rex v. Pomfret*, 5 M. & S. 139; *Campbell v. Leach*, Amb. 740.

<sup>5</sup> *Benavides v. Hunt*, 79 Tex. 883; *Doster v. Zinc Co.*, 140 Pa. 147; *Woodward v. Delaware L. & W. R. Co.*, 121 Pa. 344.

continues to act as before and extract mineral after the revocation of the license, he becomes a trespasser as to such mineral as may subsequently be removed, and the same rule obtains in the case of a lessee after a termination of his lease.<sup>1</sup> In such case the lessor or licensor is the absolute owner of the minerals, and the measure of damages would be the value of the mineral at the time of the trespass;<sup>2</sup> but where the owner of the minerals taken from his premises, sues for the value of the mineral taken, he thereby waives the tort, and could recover no damage for the trespass.<sup>3</sup>

§ 561. *Trespass by corporations.*—A corporation is generally liable for injuries to the real or personal property of another, resulting from the acts of its agents, committed within the scope of their authority, whenever an action could, under like circumstances, be maintained

<sup>1</sup> *Doering v. Hornsby*, 13 M. A. 571; *Chynowith v. G. M. & S. Co.* (a leading case), 74 Mo. 173; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Dean v. Idem*, 59 Mo. 523.

<sup>2</sup> *United M. C. Co.*, L. R. 15 Eq. 46; *Hilton v. Woods*, L. R. 4 Eq. 432; *Wood v. Morewood*, 3 Q. B. 440; *Willd v. Holt*, 9 M. & W. 672. No increased value by reason of the removal can be had. *Morgan v. Powell*, 2 Q. B. 278. See, as to measure of damage, *Austin v. Coal Co.*, 73 Mo. 585.

<sup>3</sup> *Cobb v. Griffith & Adams Sand, Gravel & Co.*, 12 Mo. App. 130; *Idem*, 37 Mo. 90. But if the trespasser knows at the time of removing the ore that he had no right thereto, the owner can recover exemplary damages in addition to the value of the mineral. *Barton C. Co. v. Cox*, 39 Md. 1. The rental value of the land is not a proper measure of damage. *U. S. v. Magoon*, 3 McLean, 171. The trespasser, however, is not allowed any deduction for getting the ore. *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278. But may claim allowance for raising. *Phillipp v. Homfrey*, L. R. 6 Ch. 770. But see, where trespass is without any fraud, *United M. C. Co.*, L. R. 15 Eq. 46.

against an individual for such an injury.<sup>1</sup> The same general rules of law govern and determine the liability of corporations, in actions for trespass, that would apply in actions against natural persons for similar injuries and aside from the difference in the manner of obtaining service, the procedure of which is regulated by statute,<sup>2</sup> there is no material difference between actions of trespass against corporations and against natural persons.<sup>3</sup> For an injury to a third person resulting from the neglect of an agent to properly protect the corporate works, the corporation would be liable, if the agent's work was within the ordinary scope of his employment, even though it did not authorize or have any knowledge of the act complained of; <sup>4</sup> and if the corporation should recognize the act done, in the course of its business, it is no defense in an action for an injury resulting from the negligence of its agent, that the act complained of was not authorized by the corporate charter.<sup>5</sup> And where the negligence of the agent is so gross as to be a reckless disregard of the consequences of his acts, the corporation may be held <sup>6</sup> for exemplary damages.<sup>6</sup>

<sup>1</sup> Boone on Cor., § 70, p. 100.

<sup>2</sup> See Statutes.

<sup>3</sup> Boone on Corporations, §§ 80 and 81, pp. 100-1. A mining corporation, conducting mining on land not its own, is liable for trespass, the same as an individual. *Yohoola River M. Co. v. Irby*, 40 Ga. 479; also *Hays v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Id.*, 2 *Id.* 163.

<sup>4</sup> *Oliver v. N. E. & C. Co.*, 9 Q. B. 409; *Taylor v. Boston Water Power Co.*, 12 Gray, 415; Boone on Cor., § 82, pp. 103-4.

<sup>5</sup> Nor would the fact that the agent had been mistaken affect the liability. Boone on Cor., § 81; *Perkins v. Mo. & C. Co.*, 55 Mo. 201. Also *Owsley v. Montgomery & C. Co.*, 37 Ala. 560.

<sup>6</sup> *Pittsburg & C. Co. v. Slusser*, 19 Ohio St. 157; *Milwaukee & C. Co. v. Arms*, 91 U. S. 489; Boone on Cor., § 80, pp. 100-1.

§ 562. **Removal of ore — Specific cases of trespass.** — Many cases are daily arising in mines to subject the operators to liability for injuries from their agent's negligence. They have been repeatedly held liable for the negligent removal of the surface support;<sup>1</sup> in an English case a smelting company was held liable for injuries to trees caused by noxious vapors;<sup>2</sup> again, liability was recognized for damages and injury to stock from a failure to properly fence the opening of a mine;<sup>3</sup> for mining ore upon the land of an adjoining property owner;<sup>4</sup> and numerous actions have been successfully prosecuted for injuries caused by the flooding of mines,<sup>5</sup> for overflows from a failure to properly dam flowing streams, and from the breaking of improperly constructed dams;<sup>6</sup> but in California the holder of a mining claim comprising the bed of a canyon, was held to have a right to erect a dam across the same, even though it flooded mining claims upon the bank of the canyon, provided he had the

<sup>1</sup> *Yandes v. Wright*, 66 Ind. 319; *Horner v. Watson*, 79 Pa. 242; *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; *Bainbridge Mines*, 485; *Harris Dam. by Cor.*, § 959; *Williams v. Hay*, 12 Cent. Rep. 692; 120 Pa. 485.

<sup>2</sup> *St. Helen's Smelting Co. v. Tipping*, 35 L. J. Q. B. 66; *Harris Dam. by Cor.* (Vol. 2), § 964.

<sup>3</sup> *Williams v. Grancott*, 4 Best & S. 149; *Fechville v. Sanden*, 48 L. J. 612; *Harris Dam. by Cor.*, Secs. 523 to 979.

<sup>4</sup> *Coal Creek M. & M. Co. v. Moses*, 15 Lea, 300; *Martin v. Porter*, 5 Mees. & W. 351; *Gilmore v. Hunt*, 66 Pa. 321.

<sup>5</sup> *Robinson v. Black Dia. Coal Co.*, 50 Cal. 460; *Jones v. Robertson* (3 West. Rep. 581), 116 Ill. 543; *Fulmer's App.*, 128 Pa. 244; *Fraser v. Sears U. Water Co.*, 12 Cal. 555; *Campbell v. Bear River &c. Co.*, 35 Cal. 679.

<sup>6</sup> *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279; *Wheating v. Christman*, 24 Pa. 298; *Hay v. Grenoble*, 34 Pa. 9; *O'Connor v. Forster*, 10 Watts, 418; *Jones v. Clark*, 42 Cal. 180; *Harris Dam. by Cor.* (Vol. 2), § 970 *et sub.*

oldest location, and the party who was flooded was without redress.<sup>1</sup>

<sup>1</sup> *Stone v. Bumpus*, 46 Cal. 218; see also *Stoger v. Ridge Ave. &c. Co.* (11 Cent. Rep. 427), 119 Pa. 70. In trespass *de bonis asportatis* the quantity, quality and value of the mineral or property taken, must be alleged. *Mallory v. Thomas*, 98 Cal. 644; *Playter's Case*, 5 Coke, 34; *Bertie v. Pickering*, 4 Burr. 245. *McConnell v. Hardeman*, 15 Ark. 151; 21 Enc. Pl. & Pr., p. 821. If the only injury alleged is the unlawful entry and removal of mineral, other injuries to the mine cannot be established, as the ground for each special damage must be alleged. *Patchen v. Keeley*, 19 Nev. 404; *Mallory v. Thomas*, 98 Cal. 644. Actual damages are recoverable, in every trespass, regardless of the good intentions of the trespasser. *Coffman v. Burkhalter* (Ill. 1901), 98 Ill. App. 804. Damages as for willful trespass cannot be recovered against one who simply neglects to have boundaries located, and without wrong intent goes into the land of his neighbor and removes mineral. *Durant Min. Co. v. Percy Co.*, 98 Fed. Rep. 166. It has been held that damages cannot be recovered for oil or gas taken by trespasser, but only for the trespass. *Wood Pet. Co. v. W. Va. Trans. Co.*, 28 W. Va. 210; *Keir v. Patterson*, 41 Pa. St. 357. But see, *contra*, *Kitchen v. Smith*, 101 Pa. St. 452. In trespass, the measure of damage for removal of ore, in the absence of malice, is the value of the mineral in place. *Wood v. Morewood*, 8 Q. B. 440; *Benson Min. Co. v. Alta Min. Co.*, 145 U. S. 428; *Warrior Coal Co. v. Mable Min. Co.*, 112 Ala. 624; *United Coal Co. v. Canon City Co.*, 24 Colo. 116; *Chamberlain v. Collinson*, 45 Iowa, 429; *Waters v. Stevenson*, 18 Nev. 157; *Tipping v. Robbins*, 71 Wis. 507; 20 Am. & Eng. Enc. Law (2 Ed.) 783; *Austin v. Coal Co.*, 72 Mo. 535.

## CHAPTER IX.

### REPLEVIN FOR MINERAL AND MINING PROPERTY.

#### SECTION 563. Definition at common law.

- 564. Under the statute.
- 565. For what it will lie.
- 566. Same — Buildings and timber.
- 567. Same — For recapture of mineral.
- 568. Measure of damages for removal of ore.
- 569. Same — Title may be incidentally raised
- 570. Where property has been confused.
- 571. What possession necessary.
- 572. Same — Licensee cannot maintain.
- 573. Action on bond.

§ 563. Definition — At common law. — Replevin is the remedy for the recovery of the possession of personal property when the same has been unlawfully detained.<sup>1</sup> It was, at common law, and still is, “a justicial writ, together with a summons to the defendant, delivered to the sheriff, or other officer, complaining of an unjust taking and detention of goods and chattels, commanding him to deliver back the same to the lawful owner, upon security given by him to make out the injustice of such taking, or else to return the goods and chattels.”<sup>2</sup> It is one of the oldest remedies known to the law, and is spoken of by both Glanville<sup>3</sup> and Bracton.<sup>4</sup> The writ

<sup>1</sup> Cobbey on Rep., Sec. 2, p. 3, and cases cited.

<sup>2</sup> Morris on Rep., §§ 1 and 2. See also Cobbey on Rep., § 1, for history of the action. Also Coke Litt., 145b.

<sup>3</sup> Beam's Glanv. 294. Glanville wrote the earliest treatise on the laws of England, about 1181, during the reign of Henry II. and furnished copious precedents and writs. Coke Inst. IV. 345.

<sup>4</sup> Bracton, 155, 156. A conversion occurs whenever the right of property in the owner is denied him by an appropriation by another. *Erskine v. Savage*, 96 Me. 57.

was originally issuable only by the court at Westminster;<sup>1</sup> but this occasioned such inconvenience that it was early made issuable by the proper tribunals throughout the kingdom, on the complaint of the person whose goods and chattels had been wrongfully detained.<sup>2</sup> When the defendant claimed the property, under the old common law action, by original writ, the sheriff could not make delivery, any more than he could upon the complaint.<sup>3</sup> It was then his duty to return the claim of property on the alias replevin, as a cause why he could not execute the writ. The practice is now different in this respect, however, both in England and this country, and on claim of property by the defendant the cause proceeds to trial just the same, although there may be a redelivery of the property to the defendant, under the statute, before the right of property is determined.<sup>4</sup> But the action at common law would only lie to try the legality of a distress,<sup>5</sup> while the statute intends that it shall furnish a complete remedy for the recovery of any personal property wrongfully taken or detained, together with compensation for the injury.<sup>6</sup>

§ 564. Under the statute. — “Claims to recover personal property, with or without damages for the withholding thereof,” is one of the classifications, under the code, of actions which cannot be joined with other causes of action.<sup>7</sup> This is nothing more nor less than the modern

<sup>1</sup> Morris on Rep., p. 56 *et sub.*

<sup>2</sup> *Ante, idem.*

<sup>3</sup> *Ante, idem.*

<sup>4</sup> Statutes different States. R. S. Mo. 1899, § 4463.

<sup>5</sup> Morris on Rep., *supra*; but see Cobbey, § 6, p. 4, where the common law forms are given.

<sup>6</sup> See Statutes different States.

<sup>7</sup> Bliss Code Pleading, § 138, p. 221.



statutory action of replevin, and the same rule holds as to the recovery of damages that obtains in the case of real actions.<sup>1</sup> The action can generally be maintained whenever the actions of trespass *de bonis asportatis* and *detinue* would lie at common law.<sup>2</sup> The code provision is not so much to authorize the recovery of damages in actions of replevin, as the union, in one proceeding, of causes of action for the recovery of distinct articles of personal property.<sup>3</sup> Where there has been a taking and detention of separate articles, having no connection with each other, it is conceded that the owner may either recover the possession, together with damages for the detention, or recover the possession alone, and prosecute a separate and independent action for the damages.<sup>4</sup> But if the claimant fails to set forth the facts which would entitle him to judgment for damages, he is presumed to have elected to recover the possession alone, and must institute a separate suit before he can recover damages for the detention.<sup>5</sup> In most of the States the action can be maintained in all cases, either for the wrongful taking or the wrongful detention of personal property and with or without damages.<sup>6</sup> In some it lies only where the property was unlawfully taken and in others only where it is unlawfully detained, while in still another class of States the writ is held to apply only in cases of wrongful distress for rent, as was the case at common law.<sup>7</sup>

<sup>1</sup> *Pharis v. Carver*, 18 B. Mon. 286; *Bliss C. P.*, *supra*.

<sup>2</sup> *Cobbey on Rep.*, § 6, p. 4.

<sup>3</sup> *Bliss Code Pleading*, §§ 182, 183.

<sup>4</sup> *Bliss on Code Pleading*, § 182.

<sup>5</sup> *Livingston v. Tanner*, 12 Barb. 481; *Larned v. Hudson*, 57 N. Y. 151.

<sup>6</sup> It lies in America, generally, in all cases where chattels have been unlawfully taken. *Cobbey*, § 19, p. 18.

<sup>7</sup> See *Morris on Rep.*, *supra*, for a full and detailed description of the different purposes to which the action is subjected. Also *Cobbey on*

But the statutes of the different States are easily consulted, and as the procedure in this action in the different States is clearly defined therein, it is deemed unnecessary to discuss the statutory changes further.

§ 565. **For what it will lie.** — Replevin will lie for any species of personal property that has been unlawfully taken or detained, and the person claiming such property in the possession of another, may maintain the action, although he may never have been in possession of the property, and whether his property in the goods be absolute or qualified, provided he has the right to the immediate possession.<sup>1</sup> But the action will not lie for the purpose of trying the title to land, or to anything included under the term lands, tenements and hereditaments.<sup>2</sup> The writ will not justify the officer executing it to sever and deliver the possession of fixtures,<sup>3</sup> nor can the possession of a building erected on leased land be recovered by this action.<sup>4</sup>

§ 566. **Same — Buildings and timber.** — Where a building has been wrongfully removed from the land, the action of replevin can be maintained to enable the owner to recover possession of the same.<sup>5</sup> A person not in

Rep., § 22 and cases. Where mineral is replevined under one writ, a seizure under a second writ, while the ore is in *custodia legis*, should be quashed, on motion. *Morris v. DeWitt* (5 Wend. N. Y. 71); 12 M. M. B. 680.

<sup>1</sup> *Morris on Rep.*, p. 77, and citations.

<sup>2</sup> *Green v. Ashland Iron Co.*, 62 Pa. St. 97.

<sup>3</sup> *Ewell on Fixtures*, p. 417 and cases. But fixtures constructively or actually severed may be recovered by this action. *Ewell on Fixtures*, p. 416.

<sup>4</sup> Nor would the action lie in any case while it was annexed to the realty as a fixture. *Ewell on Fixtures*, p. 415 *et sub.*

<sup>5</sup> *Heaton v. Findlay*, 12 Pa. St. 307; *Ogden v. Stock*, 34 Ill. 522; *Mills v. Redick*, 1 Neb. 487; *Heubschman v. McHenry*, 29 Wis. 655; *Ewell on Fixtures*, *supra*.

possession of land cannot recover the possession of timber taken from the land, or mineral removed from the soil by one in actual possession of the land, with a claim of title to the same.<sup>1</sup> But the action could be maintained for the recovery of such property, if the person who removed the same were but a mere trespasser, without the right to the permanent possession of the land, even though the owner was not in actual possession of the same.<sup>2</sup> And one in possession of land with claim of title, or one having the right of possession, which accompanies the legal title of wild and uncultivated land, can maintain the action of replevin for the recovery of such property wrongfully removed from the land, even though the same may be worked into a different form, which would materially increase the value of the property.<sup>3</sup> In laying down this proposition, it is presupposed that the property still remains in the hands of the first taker, or some one who takes with notice, for if *bona fide* holders should acquire intervening rights, the action could not be maintained.<sup>4</sup>

<sup>1</sup> *Heaton v. Findlay*, *supra*; *Page v. Fowler*, 89 Cal. 412-416; *Powell v. Smith*, 2 Watts, 126; *Harlan v. Harlan*, 15 Pa. St. 507. "The personal action cannot be made the means of litigating and determining the title to real property, as between conflicting claimants." *Ewell on Fixtures*, p. 418.

<sup>2</sup> A mere trespasser cannot raise the question of title so as to defeat the action by the owner, and the court will look into the case to see if there is in reality a title to try. *Page v. Fowler*, 89 Cal. 412 *et sub.*; *Kimball v. Lohmos*, 81 *Id.* 154; *Ewell on Fixtures*, *supra*. Replevin will lie for stone taken from the bed of a stream. *Brofay v. Bressler*, 13 M. R. 168. Fixtures removed from the realty, cannot be recovered by a mortgagee, who claims that they passed to him, under a mortgage of the real estate. *Moore v. Moran*, 89 N. W. Rep. 839.

<sup>3</sup> *Morris on Replevin*, p. 56 *et sub.*; *Cobbey on Replevin*, § 390 and citations.

<sup>4</sup> *Cobbey on Rep.*, § 396, p. 206, where the rule is said to be that if an innocent purchaser, for value changes the form and adds to the value, the action of replevin will not lie, but the owner would be compelled to

§ 567. **Same — For recapture of mineral.** — When mineral has once been severed from the land, like other produce of the soil, the character of the property is changed from realty to personalty, and an action of replevin can be maintained for its recovery in that condition.<sup>1</sup> The nature of the property is so far changed after its severance from the soil that it can be the separate subject of taxation against the owner thereof, although the title to the land is in another,<sup>2</sup> and it is the proper subject of replevin, even in its raw and uncleaned state, notwithstanding the adhesion of the earth thereto.<sup>3</sup> But replevin will not lie for min-

sue in damages for the value prior to the change, and could not appropriate the skill and labor added to the original material innocently, and it is certainly a just rule. "The measure of damages for the conversion of standing timber held to be value of the timber standing at the time of conversion." *Chappell v. Puget Sound Reduction Co.*, 67 Pac. Rep. 391 (Wash. 1902).

<sup>1</sup> *Grubb v. Bayard*, 2 Wall Jr. (C. C.) 81; *Walt's Act. & Def.*, Vol. 4, p. 440. But the ore must be definitely described and a writ for "about 400 tons of iron ore, commonly called bog ore," is so indefinite as to justify a refusal to execute it. *DeWitt v. Morris*, 18 Wend. (N. Y.) 496.

<sup>2</sup> *Forbes v. Gracey*, 94 U. S. (4 Otto) 762.

<sup>3</sup> *Green v. Ashland Iron Co.*, 62 Pa. St. 97. But a second writ will not lie for ore previously replevined, for the property is already *in custodia legis*. *DeWitt v. Morris*, 5 Wend. 71. "*Held*, that replevin would lie for its possession unwashed, notwithstanding the adhesion of the earth." *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *M. M. D.*, p. 814. The locator of a claim upon the public land of the United States can replevin mineral removed by him, for as soon as the mineral is removed, it becomes personalty; the title vests in the discoverer and the one whose labor has produced it, and the ownership of the land, by the government, will not prevent the action. *Forbes v. Gracey*, *Con. Vir. Min. Co.*, 94 U. S. 762; 24 L. P. C. Co. 818. The finder of gold on the public land, has such a title, under Sec. 2319, R. S. U. S., as to enable him to recover it from anyone who wrongfully dispossesses him of his discovery. *Burns v. Clark*, 133 Cal. 634. Under the Missouri practice the title to ore excavated by a licensee is held to be in the landowner, unless a different rule is provided for, and a purchaser from the lessee cannot maintain replevin from a purchaser from the landowner. *Chitwood v. Zinc Co.*, 98 Mo. App. 225.

eral before it has been severed from the land, for it is then a part and parcel of the realty,<sup>1</sup> and if the writ is levied upon ore not severed until after the writ issued, the action must fail. And in such case it may be inquired as to what hour the ore was severed and when the writ was issued. And if the ore was taken out and raised on the same day, the rule that parts of a day are to be disregarded cannot apply to validate a writ of replevin issued at a time before the ore had been severed.<sup>2</sup>

§ 568. Measure of damage for removal of ore. — Where the ore is wrongfully removed and appropriated without claim or color of right and in derogation of the rights of the owner, the proper measure of damage is said to be "the value of the ore taken, after it is severed from its native bed, without deducting the expense of severing it," and this rule of damage has been applied where the defendant knew, or had the means of knowing that the

<sup>1</sup> *Knowlton v. Culver*, 1 Chand. (Wis.) 214; *Ecker v. Moore*, 2 Chand. (Wis.) 85.

<sup>2</sup> "Replevin will not lie for ore before it is severed. And if the writ is levied upon ore not severed until after the writ issued the action must fail. And in such case it may be inquired as to what hour the ore was severed when the writ was issued, and the ore broken and raised on the same day, and the rule that parts of a day are to be disregarded, cannot apply to validate a writ of replevin issued at a time when the ore was not broken." *Knowlton v. Culver*, 1 Chand. (Wis.) 214; *Mor. Min. Dig.*, p. 814. "A writ of replevin for 'about four hundred tons of iron ore, commonly called bog ore,' is so indefinite as to justify a refusal to execute it." *De Witt v. Morris*, 13 Wend. (N. Y.) 496. "To what amount the word 'about' would limit or extend the number of tons considered." *Id.* *Mor. Min. Dig.* 814. But it can be maintained for slate taken by an adverse occupant of quarry. *Brown v. Caldwell*, 12 M. M. R. 674; *Mather v. Trinity Church*, 14 M. M. R. 472; *Anderson v. Hapler*, 34 Ill. 436; *Page v. Fowler*, 28 Cal. 605. Where lessor has lease on ore mined for royalty, he can replevin from a purchaser of the lessee who takes with notice. *Iron Duke Mine v. Brastad*, 112 Mich. 79; 70 N. W. Rep. 414. As to right of lessee to possession of broken mineral,

title was not in him.<sup>1</sup> But, if the ore is removed under color and claim of right, in good faith, or by a mistake as to boundaries, the measure of damages to the owner is confined to the actual value of the ore in place, or the value as severed, less the expense of carriage and severance.<sup>2</sup> The existence of the difference in the measure of damage in the two cases is founded upon apparently just and equitable reasons, for as the wrong-doer, in the one case, should not be allowed to claim any benefit or pecuniary exoneration from the effects of his wrongful act, merely because it resulted advantageously to the injured party, so, in the other case, an innocent party, acting in good faith, should not be made to suffer an outlay, to the benefit of one whose rights were practically enforced, without subjecting him to an outlay on a right he believed to be his own. This distinction in the enforcement of the rule for damages, however, is not recognized in the courts of all the States, for in some it is held an excuse of mistake or supposed right cannot justify a trespass, in the sense of affecting the injured party's right to damages,<sup>3</sup> and in others it is held

see *In re Huddell*, 16 Fed. Rep. 373; *Likens Valley Co. v. Dock*, 62 Pa. St. 232. "The owner of land may maintain detinue or replevin for oil extracted from a well on his freehold. The oil is his property and the severance does not destroy his title nor defeat his recovery." *Hall v. Reed*, 15 B. Monroe (Ky.), 479; M. M. D. 252.

<sup>1</sup> *Wild v. Holt*, 9 M. & W. 672; *Barton Coal Co. v. Cox*, 39 Md. 1; *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278.

<sup>2</sup> *Hilton v. Woods*, L. R. 4 Eq. 432; *Wood v. Morewood*, 3 Q. B. 440; *Corey v. Bright*, 58 Pa. St. 70; *McLane Co. Coal Co. v. Long*, 81 Ill. 263; *Torcite v. Wells*, 41 Pa. St. 291; *Austin v. Coal Co.*, 72 Mo. 535. To show good faith of defendant, as affecting the measure of damages, it is proper to admit a deed in evidence to the property on which the conversion occurred, although such deed was void. *Acre v. Buford*, 31 South. Rep. 898. But see following: "Evidence of the defendant's intent, in taking the ore, in replevin for mineral taken, is wholly immaterial." *Ecker v. Moore*, 2 Pinney (Wis.), 425; 12 M. M. R. 685.

<sup>3</sup> *Maye v. Yappen*, 23 Cal. 306; *Robertson v. Jones*, 71 Ill. 405. But,

that in addition to the recovery of the value of the ore taken, without a deduction for the cost of removal, the owner is also entitled to recover, in cases where the wrong is palpable, or the infringement of the right accompanied with knowledge or fraud, an amount, as exemplary damages, commensurate with the extent of the wrong committed.<sup>1</sup>

§ 569. *Same*—Title may be incidentally raised.—It was held in one of the earlier cases that the title to real estate could be incidentally raised in a transitory action.<sup>2</sup> It is a mistake, therefore, to suppose that title to land can-

for equitable rule, see *In re United Min. Co.*, L. R. 15 Eq. 46; *Powell v. Aiken*, 4 Kay & J. 348.

<sup>1</sup> *Barton Coal Co. v. Cox*, 39 Md. 1. And see, for a full exposition of the rule as to damages, *Morgan v. Powell*, 2 Q. B. 278, and *United States v. Magoon*, 8 McLean, 171. "Defendant, in 1872, sank a shaft on its own land 388 feet west of the west boundary of its own land, to the depth of 549 feet, and worked its coal bed to and beyond such boundary. Upon defendants filing certain maps required by statutes in aid of ventilation, etc., in 1873, plaintiff learned for the first time that defendant had worked across bounds into his part of a stratum of coal two feet thick, and extracted 610 tons. Plaintiff then demanded this coal, which had long since been sold and disposed of. In trover for the coal so taken it was *Held*, that the measure of damages was the value of the coal at the mouth of the shaft less the cost of carriage from the breast where broken, which is only another mode of expressing its value as it lay in the run where it had no value as a salable article. 2. That the conversion was complete at the moment of severance. 3. For the expense and trouble of sorting, defendant could not claim to be reimbursed, but for the cost of bringing it to the pit's mouth they should be allowed, because any person purchasing the coal in the pit would have deducted from the price such cost of carriage." *McLane County C. Co. v. Long*, 81 Ill. 363; M. M. D. 231. "A different rule of damages does not prevail in trespass for breaking and entering a coal mine and carrying away coals, from that which governs in trover for the coals, except where circumstances of aggravation are relied on in trespass. The rule is the same in both forms of action." *Id.*; M. M. D. 231.

<sup>2</sup> *Hart v. Vincent*, 6 Helsk. 615. See also *Hungerford v. Redford*, 29 Wis. 347.

not be incidentally tried in an action of replevin. When machinery, or any other fixture, is annexed to and forms a part of a certain tract of land, and the latter is sold without a reservation of such fixture, as the fixture is necessary to constitute the premises, as they purport to be, and in reality, forms a part and parcel of the freehold, if the same is dissevered by the former owner, after a sale of the real estate by himself, the purchaser of the real estate may maintain replevin for the fixture against the person who detached it, and he could recover in such action, although he could only prove his title to the chattel, by showing a title to the premises from which the same was taken.<sup>1</sup> So, it is presumed that proof of title and actual possession of a tract of land could be set up as a defense to an action by one who claimed the title to minerals or other produce taken from such land, in order to show that the plaintiff, in appropriating such produce, was nothing but a trespasser, and that the defendant was in possession at the time of the appropriation, and was therefore the real

<sup>1</sup> Morris on Replevin, pp. 107 and 108 and cases cited. "Mere assertion of title is nothing if same is not in controversy." *Green v. Ashland Iron Co.*, 62 Pa. St. 97. But the owner of land or one out of possession, cannot maintain replevin for ore removed by one in the actual possession, for, as said by Duncan, J., in *Brown v. Caldwell*: "If it could lie in this case, then replevin would lie by the owner of the soil for coal dug out of a coal mine in England and brought to Pennsylvania, and the title to the soil, in a foreign nation, be tried in this transitory action." *Brown v. Caldwell* (10 Serg. & Rawle, 114), 12 M. M. R. 679. See also *Mather v. Trinity Church* (3 S. & R. 509), 14 M. M. R. 324; *Harlan v. Harlan*, 15 Pa. St. 507; *Anderson v. Harper*, 34 Ill. 486; *Page v. Fowler*, 28 Cal. 605. Replevin will not lie for mineral, prior to its severance from the soil, as it is then real estate. *Knowlton v. Culver*, 2 Pinney (Wis.), 243; 52 Amer. Dec. 156; 12 Mor. Min. Rep. 682. That soil adheres to the mineral replevined does not prevent the action, or change the subject-matter to real estate, for title may be incidentally raised and in replevin for mineral taken the title to the soil that adheres to the ore is not in issue, but only the mineral itself. *Green v. Ashland Iron Co.*, 62 Pa. St. 97; 12 M. M. R. 692.



owner of the produce.<sup>1</sup> If for no other reason, such evidence could be held admissible, if true, on account of operating as a bar to the plaintiff's right of action, and this would certainly be the case where there was no contest of the title to the land.<sup>2</sup> But if it should appear that the plaintiff was in actual possession of the land, under claim of title, at the time of the appropriation of the produce of the soil, the defense of title would not be admissible on the part of the defendant, and especially would this be true if the plaintiff could establish a title to the produce *aliunde*.<sup>3</sup>

<sup>1</sup> *Elliott v. Powell*, 10 Watts (Pa.), 454; *Cobbey on Replevin*, § 387. But the fact that one was in possession of land under a mere colorable title, would not avail to defeat a replevin by the true owner of the produce from the land. *Harlan v. Harlan*, 15 Pa. St. 507; *Cobbey on Rep.*, *supra*.

<sup>2</sup> As to how far the question of title to land may be considered in replevin, see *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *Mor. Min. Dig.* 814.

<sup>3</sup> See *Morris on Replevin*, pp. 106 and 107, and cases cited by author. The court would not permit the defense to enter into a controverted question of title to the realty in this kind of an action. *Cobbey on Replevin*, § 378, p. 195, citing *Page v. Fowler*, 28 Cal. 608; *Harlan v. Harlan*, *supra*; *Halleck v. Nifer*, 16 Cal. 575. But if there is no adverse possession under claim of title the owner can always maintain replevin. *Brewer v. Fleming*, 51 Penn. St. 111; *Sands v. Peiffer*, 10 Cal. 258; *Anderson v. Hoper*, 34 Ill. 436, all cited in *Cobbey on Rep.*, § 378, p. 195. "Replevin will not lie by one not in the actual exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious occupation and possession thereof, claiming the right, for the recovery of slates taken out of a quarry on the land." *Brown v. Caldwell*, 10 S. & R. 114; M. M. D. 314. "Title to land cannot be tried, but may incidentally arise and be heard in a transitory action. The mere assertion of title is nothing if the title be not in fact in controversy; but when it appears that there is necessitated a trial of title to determine the right to the chattel, replevin will not lie." *Green v. Ashland Iron Co.*, 62 Pa. St. 97; M. M. D. 314. A licensor may replevin ore mined, where the licensee is to mine it for a certain per cent but asserts title to the ore. *Empire Zinc Co. v. Freeman*, 75 Mo. App. 524.

§ 570. Where property has been confused. — All the authorities agree that where a man willfully and wrongfully unites his own property with that of another, so as to render them undistinguishable, he will not be entitled to his proportion, or any part of the property, unless the property of the two owners is the same in quality and value.<sup>1</sup> For instance, if one purposely, or by negligence, commingles mineral of an adjoining landowner with mineral of another kind, belonging to himself, so that a separation of the two becomes practically impossible, the law permits the owner of the mineral so commingled in retaking it, to take that which is inseparably connected with it, since in no other way could he reclaim his own property.<sup>2</sup> And the owner of such mineral could maintain the action of replevin for the recovery of his property, if the same could be distinguished, and if it could not, for the whole of the property that had been wrongfully intermingled.<sup>3</sup> And so the action could be maintained for oil of the plaintiff wrongfully taken from his tank and mixed with oil of the defendant in another tank.<sup>4</sup> But as the infliction of civil penalties, in any form, is odious to the law, when the property commingled is of substantially the same quality and value, the

In replevin of ore, plaintiff must generally allege title to the land sufficient to show a general or special ownership in the ore taken. *Mont. Min. Co. v. St. Louis Min. Co.*, 102 Fed. Rep. 430.

<sup>1</sup> Cobbey on Replevin, § 899, p. 208, and cases cited; *Williamson v. Gottschalk*, 1 Mo. App. 425; *Morris on Replevin*, pp. 100, 101. If the property can be separated without loss to either party this will of course be done.

<sup>2</sup> *Siebert v. McHenry*, 6 Watts (Pa.), 301; *Eldred v. The Oconto Co.*, 33 Wis. 133; *The "Idaho"* 98 U. S. 575; *Thorn v. Colten*, 27 Iowa, 427; *Lupton v. White et al.*, 15 Ves. Jr. 432; *Mor. Min. Dig.* 33.

<sup>3</sup> *Coolley on Torts*, pp. 56 and 57, and cases cited; *Morris on Replevin*, pp. 100 and 101. See, for case where the whole lot of commingled ore was awarded to innocent owner, *Lupton v. White et al.*, 15 Ves. Jr. 432.

<sup>4</sup> *Wilkinson v. Stewart*, 5 Weekly Notes, p. 70; *Morris on Rep.*, p. 101.

innocent owner would not be permitted to take the whole of the property wrongfully mixed together, for to give him an equal quantity with the property which he owned, together with damages for any injury he may have received in being deprived of the use of such property, would be to do him substantial justice.<sup>1</sup> And indeed this rule has been held to obtain in cases where the property commingled was not the same in all respects; it having been adjudged sufficient if it was practically the same, "so that the separation of that which is equivalent in quantity and measure will give to the party, whose property has been wrongfully taken, a just or substantial equivalent in kind and value."<sup>2</sup> And this would seem to be the more equitable doctrine.

§ 571. **What possession necessary.** — The right of a plaintiff in replevin to recover depends on his own right to

<sup>1</sup> And Mr. Cobbe states this to be the true rule, where the separation can be made without loss to either owner. Cobbe on Rep., § 399, p. 208.

<sup>2</sup> Cooley on Torts, p. 58, and authorities. Cobbe on Rep., § 400, and cases, p. 209, cited by author. But if property has been changed it can be retaken in whatever shape it has assumed, being described as it exists at the time of the commencement of the suit. *Wingate v. Smith*, 20 Maine, 287; *Betts v. Lee*, 5 Johns. 348; *Snyder v. Vaux*, 2 R. 427; *Brown v. Sax*, 7 Cowen, 95. Where plaintiff's oil has been commingled with other like oil of defendant, by a third party, the plaintiff can recover if the quality of the oil is the same. *Wilkinson v. Stewart*, 13 M. M. R. 1; 85 Pa. St. 255. "Two persons leased land for the purpose of boring salt wells and manufacturing salt, rendering a royalty of every twelfth barrel manufactured. After a time oil rose with the salt water, which, though at first suffered to run to waste, was afterwards collected and sold. In trover, therefore, it was held: 1. That the lease was in effect a grant of the crude salt in the land for a twelfth part of the manufactured article; 2. That as the salt only was granted, the lessor retained all the rest of the contents of the land, including the oil, as exclusively after the lease as before; 3. That as the lessees could not raise the brine without the petroleum, the severance of the oil as

immediate possession of the property.<sup>1</sup> The complainant must be entitled to the immediate and exclusive possession of the property claimed, hence, one joint owner of personal property cannot maintain the action against a co-owner, for the reason that he would not be entitled to the exclusive possession.<sup>2</sup> And mere naked possession will not support the action, with a general or special property in the plaintiff.<sup>3</sup> But it is not necessary that the claimant should be the absolute owner of the property claimed; and if he has a special ownership in the property or an interest in it of a temporary and limited nature, if he had actual possession and has been deprived of it by the defendant, it is sufficient to enable him to maintain the action.<sup>4</sup> While an agreement is executory, however, the action of replevin will not lie,<sup>5</sup> and a vendee cannot maintain the action for the possession of the property to be sold on a mere agreement for a sale; the sale must be executed and the property in the chattel transferred, before the vendee can be properly said to be entitled to the possession; until that time, his only remedy would be an action for damages for

an incident inevitable to the grant of the right to take salt water was lawful, as was their possession of it, after it was raised to the surface." *Kier v. Peterson*, 41 Pa. St. 387; reversing *Peterson v. Kier*, 2 Pgh. 191.

<sup>1</sup> *Fleming v. Clark*, 22 Mo. App. 218. "A licensee cannot maintain replevin for ore severed from the land which he is working under license, by a stranger or trespasser, for he is not and never was, entitled to the exclusive possession of the same." *Gillett v. Treganza*, 6 Wis. 848.

<sup>2</sup> *Lisenby v. Phelps*, 71 Mo. 522; *Pulliam v. Burlingame*, 81 *Id.* 111; 58 Mo. 897. But see *Melton v. Lombard*, 51 Cal. 258.

<sup>3</sup> *Manfg. Co. v. Bean*, 20 Mo. App. 120; *Wright v. Richmond*, 21 Mo. App. 76; *Gartside v. Nixen*, 43 Mo. 138; *Alden v. Carver*, 13 Iowa, 253. But the right to possession alone will support the action against a trespasser. *Cobbey on Rep.*, § 86, p. 52; *Mead v. Kilday*, 2 Watts (Pa.), 110; *Holliday v. Lewis*, 15 Mo. 403.

<sup>4</sup> *Gartside v. Nixon*, 43 Mo. 138; 5 Mo. App. \*584; *Bayard v. Jones*, 9 Humph. (Tenn.) 739; *Harlan v. Harlan*, 53 Am. Dec. 612.

<sup>5</sup> A contract cannot be enforced by the action of replevin. *Cobbey on Rep.* 289.

breach of the contract.<sup>1</sup> It is also necessary for the maintenance of the action that the defendant should have been in possession of the property at the commencement of the action and where it does not appear that he was in possession when the suit was brought, and there is no evidence going to show a wrongful seizure of the property, there is no foundation for a judgment and the action could not be maintained.<sup>2</sup> And where there is a conflict of testimony as to the possession of the defendant at the time of the commencement of the suit, it is error for the court to instruct the jury that his possession at any time prior thereto is sufficient.<sup>3</sup>

§ 572. **Same — Licensee cannot maintain.** — While the question of title to land cannot be tried<sup>4</sup> and all that is necessary to maintain the action is the right to possession of the mineral,<sup>5</sup> since a right of possession is essential, a mere licensee cannot maintain the action,<sup>6</sup> unless he also has a right to the possession of the ore. But if the licensee

<sup>1</sup> Cobbe on Rep. 289, cited *supra*; *Curry v. Schmidt*, 54 Mo. 515.

<sup>2</sup> The rule as laid down by Mr. Cobbe is that the defendant must be in actual or constructive possession. Cobbe on Rep., §§ 481-3. Must be in control of the property. Cobbe, § 184 and cases; *Id.* 64-5; 182; 448.

<sup>3</sup> *Rogers v. Davis*, 21 Mo. App. 150; 8 M. A. 454; 5 *Id.* 565.

<sup>4</sup> *Green v. Ashland Co.*, 12 M. M. R. 692.

<sup>5</sup> *Wilkinson v. Stewart*, 18 *Id.* 1.

<sup>6</sup> *Gillett v. Treganza*, 6 Wis. 343; *Rochester v. Min. Co.*, 86 Mo. App. 447. A licensee cannot maintain replevin for ore severed from the land which he is working under license, by a stranger or trespasser. *Gillett v. Treganza*, 6 Wis. 343; M. M. D. 814. "The lessor, not the lessee (of ground leased for farming purposes only), has the right of action for stone quarried and taken from the leased ground during the term, by a stranger." *Freer v. Stotenbur*, 2 Abb. App. (N. Y.), reversing 36 Barb. 641. "And this, although the lessee had a license to take stone indorsed on his lease of the farm at the time of its delivery." *Id.*; M. M. D. 204.

also has a property interest in the ore, either general or special, then he could maintain the action, as against a mere wrong-doer.<sup>1</sup>

§ 573. **Action on bond.** — As explained in a former section, replevin is purely a statutory action, and the method of procedure in the different States is so clearly defined, it is not deemed necessary to discuss the practice. The plaintiff is required to deposit a bond, the exact conditions of which vary in the different States, for the diligent prosecution of the action, and an obligation to respond for any unnecessary delay, and compensate the defendant for any injury resulting from the plaintiff's negligence.<sup>2</sup> The words usually employed are that he will prosecute his action "without delay and with effect."<sup>3</sup> The plaintiff is bound to use due diligence in the prosecution of his action, and for any negligence or delay in this respect, is responsible under the obligation of his bond, which requires him to prosecute without delay and with effect.<sup>4</sup> To prosecute the action with effect has been construed to mean that the plaintiff must not only proceed to a decision of the cause, but that he must also succeed in the action.<sup>5</sup> But in those States where the action is held to abate with the death of the defendant, this condition of the bond is saved when the

<sup>1</sup> *Henley v. Wood*, 2B. & Ald. 736; *Springfield Foundry Co. v. Cole*, 130 Mo. 1. Where the title to the ore remains in the landowner until royalty is paid, and licensee only receives a per cent of the mineral, the landowner can maintain replevin for the ore mined as against the licensee. *Empire Zinc Co. v. Freeman*, 75 Mo. App. 524.

<sup>2</sup> See, as to most usual conditions of bonds in replevin, and what is construed a breach thereof, *Cobbey on Rep.*, §§ 1250-1259.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Cobbey on Rep.*, §§ 1269 and 1281.

<sup>5</sup> *Chapman v. Crabtree*, 72 Maine, 473, cited by *Cobbey*, §§ 1353-4; see also *Cobbey*, § 1253.

suit is prosecuted until the defendant dies, although it would be otherwise, where the action does not abate with defendant's death.<sup>1</sup> A bond to the replevying officer is void when the statute requires that it should be given to the defendant;<sup>2</sup> where the sureties are insolvent the defendant may proceed against the replevying officer on his bond, and in such case the sureties could be introduced to prove or disprove the question of their solvency.<sup>3</sup>

<sup>1</sup> Taylor Land. & Ten., § 742. As to what would be unnecessary delay, depends upon the facts of each particular case. Cobbey on Rep., § 1352.

<sup>2</sup> Ten. v. Harrington, 54 Miss. 732; Cobbey on Rep., § 685.

<sup>3</sup> Jeffrey v. Bastard, 4 A. & E. 823. And if good when taken, sheriff is not liable. Cobbey on Rep., § 689.

## CHAPTER X.

### MINERS' AND MECHANICS' LIENS.

**SECTION 574. Nature of the remedy.**

- 575. When statute given retroactive force.
- 576. How lien enforced.
- 577. What complaint should show.
- 578. Who can file lien.
- 579. Same — Labor and materials.
- 580. Same — Partners and cotenants.
- 581. Prevented by assignment of debt.
- 582. Time for filing lien.
- 583. Character of work necessary.
- 584. Character of owner's title.
- 585. Same — Against lessee.
- 586. Same — Will not lie against improvements made by licensee.
- 587. To what property lien attaches.
- 588. Same — Character of improvement and nature of annexation essential.

§ 574. **Nature of the remedy.** — Nearly all of the States, where mining is carried on to any great extent, have provided by State legislation for the payment of mine employees, by giving them a statutory lien, upon the mine and mining property, for the labor performed upon the same, and have provided the manner in which this lien can be enforced.<sup>1</sup> The courts, generally, lean to a liberal construction of the lien law, in order that the miner and mechanic may have the full benefit of these statutory provisions,<sup>2</sup> and the mere fact that the statute does not extend

<sup>1</sup> See Statutes at Large, R. S. U. S., § 2832; Wade's Am. Min. Laws, pp. 221 and 222.

<sup>2</sup> *Hays v. Mercier*, 22 Neb. 656; 35 N. W. 894; *White Lake &c. Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262; *Dugan Cut Stone Co. v. Grey*, 114 Mo. 500; *DeWitt v. Smith*, 63 Mo. 263-266; *Skyrure v. Occidental &c. Co.*, 8 Nev. 219.



the remedy to other laborers, aside from those employed to labor in or upon the mine, does not affect the rights of the mine employees, under the statute,<sup>1</sup> nor can the right, given by the statute, be claimed for other laborers than those employed in or about the mine, under the constitutional provision that "all laws of a general nature shall have a uniform operation."<sup>2</sup> The object of such statutes is to prevent fraud and imposition and to protect the rights of the mine employee by giving him a lien upon the employer's property for the payment of his wages for the work and labor which he had bestowed upon the mine, which of course helped to increase the value of the property. This object of the statute would be defeated, if it did not provide some way for the enforcement of the right given thereunder, and for this reason most of the State statutes give the miner's lien priority over other incumbrances.<sup>3</sup>

§ 575. **When statute given retroactive force.** — These statutes will not, in general, however, have any retroactive force, especially where the rights of third parties are affected.<sup>4</sup> A mortgage will have priority over a lien for labor, unless the work for which the lien was filed commenced before the execution and recording of the mort-

<sup>1</sup> Wade's Am. Min. Laws, § 156, p. 222 *et sub.*

<sup>2</sup> Quale v. Moore, 48 Cal. 479.

<sup>3</sup> Capron v. Sprout, 11 Nev. 304; Love v. Cox, 68 Ga. 269. It is made a prior incumbrance to all liens dating subsequent to the erection on which the lien is claimed. Harris' App., 39 Pa. St. 409; Tuttle v. Montford, 7 Cal. 358; Phil. Bank v. Shenandoah Iron Co., 35 Fed. Rep. 486; Mark v. Murphy, 76 Ind. 584. But it will not have priority over a mortgage executed simultaneous with the first acquisition of ownership by the defendant, even though the work may have been commenced before. Steininger v. Roemer, 28 Mo. App. 594.

<sup>4</sup> Wade's Am. Min. Laws, § 156, p. 224; Preston v. Sonora Lodge, 39 Cal. 116.

gage;<sup>1</sup> and in order for the employee to take advantage of the statute, the work upon the mine must have been performed subsequent to the enactment of the law giving him the lien.<sup>2</sup> But while the lien law will not usually have retroactive force, and will not ordinarily prevail for work done before the statute was in force, although such a construction is questionable from a constitutional standpoint,<sup>3</sup> there are certain cases where the miner's lien has been upheld, even though it be necessary to give the statute a retroactive force for the purpose of enforcing the rights acquired thereunder.<sup>4</sup> In order to let the miner avail himself of his rights, it has been held that the statute would be given a retroactive force, whenever it would not affect the rights of some third party,<sup>5</sup> and in enforcing the lien, if part payment had been made for the work performed, and part of the work had been performed before the statute came in force, the court would permit the miner to apply the credit to that portion of the work for which he held no lien,<sup>6</sup> even though the work had been completed, and a mortgage given on the property to which the lien attached.<sup>7</sup>

<sup>1</sup> *Preston v. Sonora Lodge*, *supra*. And a mortgage recorded even after the employment of a laborer, payable monthly, is a prior lien. *Capron v. Sprout*, 11 Nev. 304.

<sup>2</sup> *Hunter v. Savage & Co.*, 2 Mont. 443; *Wade's Am. Min. Laws*, *supra*.

<sup>3</sup> U. S. Con., Art. I, § 9, cl. 3; also § 10, cl. 1; *Cooley Pr. Con. Law*, pp. 285-287.

<sup>4</sup> *Wade's Am. Min. Laws*, § 156, p. 224.

<sup>5</sup> *Gordon v. South Fork & Co.*, 1 McAll. 513; *Wade's Am. Min. Laws*, *supra*.

<sup>6</sup> *Hunter v. Savage & Co.*, 4 Nev. 153; *ante, idem*.

<sup>7</sup> *Capron v. Sprout*, 11 Nev. 304. "A lien act may be retroactive if it do not affect intermediate vested rights." *Gordon v. South Fork Can. Co.*, 1 McAll. 513; M. M. D. 212. "Where an act giving a lien for labor done on mines was passed Feb. 6, 1867, and in a bill filed under it the plaintiff claimed for the whole period during which he had

§ 576. **How lien enforced.** — The statutes of the various States may differ somewhat as to the manner of enforcing the miner's lien, but as the object of all the different statutes is the same, the proceedings to enforce the lien are similar in the different States.<sup>1</sup> A formal suit is ordinarily required, the same as that necessary for the enforcement of other laborer's liens.<sup>2</sup> A correct account of the work and labor performed, should be filed<sup>3</sup> in the proper court, by the party wishing to avail himself of the provisions of the statute, and under the lien law of most of the States, the recorder,<sup>4</sup> or other proper officer of the county, is authorized by statute to take the proper affidavit,<sup>5</sup> although this is not necessary in some of the States,<sup>6</sup>

worked, which had commenced before the passage of the act and had been continuously carried on: *Held*, that the lien should only apply to work done after the date of its passage (excluding also the day of the date), but that all payments made from time to time should be applied upon the amount due before the passage of the act. And that an ordinary judgment should be entered for balance still due for work done before the passage of the law." *Hunter v. Savage Cons. S. M. Co.*, 4 Nev. 155; *M. M. D.* 212. But in contests between lien claimants and mortgagees of a mine there must be strict proof that the work or materials were furnished prior to the execution of the mortgage. *Davis v. Alvord*, 94 U. S. 545; *Schull v. Mining Assn.*, 128 Ind. 381; *Granby Min. Co. v. Turley*, 61 Mo. 375. As to priority of laborer's lien for labor over a creditors suit to wind up an insolvent concern, see *Kahle v. Long Beach Oil Co.* (W. Va. 1902), 41 S. E. Rep. 238. But as to priority of laborer's liens over first mortgage bonds of mining corporation, in hands of a receiver, the rule of the Federal court, as to railroads, does not obtain and the mortgage will have priority. *Merriam v. Victor Mining Co.* (Oregon), 60 Pac. Rep. 997. As to priority of material man's lien over receiver's certificate, see *Osborne v. Big St. Co.*, 96 Va. 58; 80 S. E. 446.

<sup>1</sup> See statutes of different States.

<sup>2</sup> *Skyrme v. Occidental & Co.*, 8 Nev. 219; *Elliott v. Ivers*, 6 Nev. 287.

<sup>3</sup> *Allen v. Frumet M. & S. Co.*, 78 Mo. 688.

<sup>4</sup> *Arrington v. Wittenberg*, 12 Nev. 99.

<sup>5</sup> See Statutes.

<sup>6</sup> A verification stating that the claim "is true" has been held suffi-

and the certificate of the lienor should also be filed with the account as to the matters necessary, under the laws of the State, to give the miner the full benefit of the statute.<sup>1</sup> Notice is usually required to be given, in order to secure the attendance of other parties, holding liens or other incumbrances, against the property of the recalcitrant mine owner,<sup>2</sup> and thus prevent circuitry of actions, and adjust the rights of the conflicting claimants all in one proceeding. But though it is usually necessary for the party filing the lien to give the proper notice,<sup>3</sup> in order to avail himself of the provisions of the statute, the rights of other parties possessing a lien on the same property will not be affected by a failure of the first lienor to give the proper notice,<sup>4</sup> and after the defendant has appeared in court, parties possessing the right to claim a lien can ask to have their liens enforced, even after the court has dismissed the suit of the original lienor.<sup>5</sup>

cient in California. *Arota v. Tellurium Gold & Sil. Min. Co.*, 65 Cal. 340. In Missouri an affidavit was held good, although not signed. *Loswell v. Presbyterian Church*, 46 Mo. 279. For rule in Illinois see *Bennett v. Wilmington Star Min. Co.*, 109 Ill. 9. But for rule in other States see *Merriman v. Bartlett*, 84 Minn. 534; *Klag v. Moise*, 50 N. Y. (L. C.) 183; *Gibbs v. Peck*, 77 Pa. St. 86. As to defective affidavit, see *Morrison v. Phillippi*, 35 Minn. 192; *Hays v. Mercier*, 22 Neb. 656.

<sup>1</sup> See authorities, *supra*.

<sup>2</sup> *Brown v. Wright*, 25 Mo. App. 54; *Neeley v. Searight*, 113 Ind. 316; *Kezortee v. Marks*, 15 Oregon, 529; *Prescott v. Maxwell*, 48 Ill. 82; *Schmidt v. Gilson*, 14 Wis. 514; *Greeley S. S. & Co. v. Harris (Colo.)*, 20 Pac. Rep. 764; *Shover v. Murdock*, 86 Cal. 293; *Welthoff v. Murray*, 76 Cal. 508; *Leibs v. Englehardt*, 78 Ala. 508; *Brown v. Crump*, 2 Swan. (Tenn.) 531.

<sup>3</sup> *Ante, idem*.

<sup>4</sup> *Elliott v. Ivers*, 6 Nev. 287.

<sup>5</sup> *Ante, idem*. *Wade's Am. Min. Laws*, p. 226. For the construction of mining lien statutes, in the different mining States, see: *Fernandez v. Burleson*, 110 Cal. 164; *Wilkins v. Abel*, 26 Colo. 462; *White v. Mullins*, 2 Idaho, 1164; *Borders v. Uhe*, 88 Ill. App. 634; *Allen v. Frumet Min.*

§ 577. **What complaint should show.** — The complaint of the party suing to enforce the lien should generally express an intention to hold and claim the lien; <sup>1</sup> show the contract and price on which he seeks to recover for his work or materials furnished; <sup>2</sup> a description of the property, or so near as to identify the same, <sup>3</sup> the sum total, in dollars and cents, that the work or materials amount to, stating that it is due and that no portion has been paid. <sup>4</sup> Such a statement would be a substantial compliance with the statutes of most of the States and sufficiently clear to enable the laborer to recover. <sup>5</sup> A technical description of the land is not essential and the complaint will be sufficient if it clearly points out the tract, and defines the amount of land to be included in the charge for which the lien is filed. <sup>6</sup> The description in the complaint, however, should correspond with that contained in the lien account, but it is held to be sufficient if the land described could be conveniently pointed out. <sup>7</sup> The contract, together with the price agreed to be paid for the work or materials, should be clearly set

Co., 78 Mo. 688; *Johnson v. Puritan Min. Co.*, 19 Mont. 80; *Rosina v. Trowbridge*, 20 Nev. 105; *Williams v. Toledo Coal Co.*, 25 Oreg. 426; *Venard v. Greene*, 4 Utah, 67; 20 Am. & Eng. Enc. Law (2 Ed.), 790, 791.

<sup>1</sup> *Rice Reduction and Mining Co. v. Musgrove* (Colo.), 23 Pac. Rep. 458.

<sup>2</sup> *Smither v. Bennett* (Md.), 19 Atl. Rep. 1048. An excessive claim does not necessarily vitiate the lien. *Malone v. Mining Co.*, 75 Cal. 578. The notice provided for by California statute may be dispensed with where laborer was employed by manager of defendant company. *Hines v. Miller*, 122 Cal. 517; 55 Pac. Rep. 401.

<sup>3</sup> *Montgomery Iron Works v. Dorman*, 78 Ala. 718; *Tredinnick v. Red Cloud Min. Co.*, 72 Cal. 78; *Iron Works v. Oil Co.*, 18 Atl. Rep. 739.

<sup>4</sup> *Hodman v. Franel*, 86 Ala. 472; *Valentine v. Rawson*, 57 Iowa, 179.

<sup>5</sup> See Statutes. *Henry v. Plitt*, 84 Mo. 287.

<sup>6</sup> *Brown et al. v. Wright et al.*, 25 Mo. App. 54; *McClintock v. Rush*, 68 Pa. St. 208; *Bedsale v. Peters*, 79 Ala. 133.

<sup>7</sup> *Tibbetts v. Moore*, 23 Cal. 208; *Kennedy v. House*, 41 Pa. St. 39.

forth,<sup>1</sup> the time at which the lienor was employed,<sup>2</sup> the character of the work performed,<sup>3</sup> or of the materials furnished, by whom and for whom the same was done, together with a designation of the mine.<sup>4</sup> These matters, if set forth in a clear and concise manner, will entitle the plaintiff to his lien, on the corresponding proof, but, as in all forms of pleading, under the code, only the issuable facts should be stated.<sup>5</sup>

§ 578. Who entitled to file lien.—As a general rule, only those parties who spend their time and labor in the service of the mine operator or employer and are employed to work upon the mine, can claim the benefit of the miners' lien law.<sup>6</sup> It frequently becomes a matter of some difficulty to determine just who is to be considered a mine employee within the meaning of the statute. The question to be determined in such cases is whether or not the work, for which the lien is filed, was actually performed upon the mine; if it was, or if the material was used in or upon the mine, the laborer or materialman will have a lien upon the mine for the work done, or the materials furnished.<sup>7</sup> The foreman of a mine is a mine employee within the mean-

<sup>1</sup> *Parker v. Savage Placer Min. Co.*, 61 Cal. 348; *Miller v. Bedford*, 86 Pa. St. 454; *Bodderick v. Poillon*, 2 E. D. Smith (N. Y.), 554; *Logan v. Attix*, 7 Iowa, 77; *Gogin v. Walsh*, 124 Mass. 516.

<sup>2</sup> *Hooper v. Flood*, 54 Cal. 218; *Sandral v. Ford*, 55 Iowa, 461; *Reneker v. Hill*, 3 Phila. (Pa.) 110.

<sup>3</sup> *Morris Canal Co. v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189; *Hill v. Bishop*, 25 Ill. 349; *Crawford v. Crocket*, 55 Ind. 220.

<sup>4</sup> *Wilcox v. Keith*, 8 Oregon, 372; *Flynn v. Davis*, 2 Wyoming, 118; *Hicks v. Murray*, 48 Cal. 515.

<sup>5</sup> Bliss on Code Pleading, § 319 *et sub.*

<sup>6</sup> The work, to be lienable, must be done with the consent of the owner. *Moore v. Jackson*, 49 Cal. 109.

<sup>7</sup> *Vastine's App.*, 38 Pa. St. 164; *Perkins v. Pike*, 42 Me. 141; *Busfield v. Wheeler*, 14 Allen (Mass.), 139. But although the lien depends on the strength of the labor performed on the property, the debt must be due

ing of the statute and will have a lien on the mining property for the payment of his wages,<sup>1</sup> and it has been held that one employed to cut timber, which is to be used for cribbing purposes in a mine, is a mine employee, and entitled to a lien upon the property for his services.<sup>2</sup> The individual members of a mining partnership are also entitled to a lien for partnership claims against the mine that have been paid and for expenses incurred, in excess of the proportionate expense of the different members for

when the notice is given. *Blythe v. Poultney*, 81 Cal. 234. But the "incidental labor for which liens are given under the statutes must be directly done for, or connected with or actually incorporated into the building or improvement sought to be charged and if they are not done so, the lien must fail." *Rara Avis &c. Mining Co. v. Bouscher*, 9 Colo. 385; s. c. 15 Am. & Eng. Enc. of Law, p. 37. "Hauling quartz to a quartz mill is 'performing labor for carrying on the mill' (Stat. of Nev. 1861), and gives the laborer a lien upon the mill." *In re Hope M. Co.*, 1 Sawyer C. C. 710; M. M. D. 210. "The foreman of a mine has a lien for his wages or salary." *Capron v. Sprout*, 11 Nev. 304; M. M. D. 212. "A mining expert who contracted to explore certain mines held not entitled to assert a mechanic's lien on the property for such services under Mechanic's Lien Act." *Lindemann v. Belden-Consol. Min. & Mill. Co. (Colo.)* 65 Pac. Rep. 403. The general manager and superintendent of a mine who performed no bodily labor, but only superintended the operations, is not entitled to a lien, under the New Mexico statute. *Boyle v. Mining Co.*, 9 N. M. 237; 50 Pac. Rep. 347. See, also, *Colo. Iron Works v. Taylor*, 12 Colo. App. 451; 55 Pac. Rep. 942. "One who contracts to drill an oil well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a mechanic's lien against the well for the work so done and the materials furnished, under the provisions of the second section of the act of the seventh of March, 1878." *Vandergrift's App.*, 88 Pa. St. 127; M. M. D. 211. "Materials furnished for engine, derrick, etc., to the lessee of an oil well are protected by the Lien Acts of Feb. 17, 1858, and April 11, 1866." *Robson & Co.'s App.*, 62 Pa. St. 405; M. M. D. 211. "A brick-maker has a lien upon the brick manufactured by him, under contract with the owner of the brick-yard." *Moore v. Hitchcock*, 4 Wend. 298; M. M. D. 211.

<sup>1</sup> *Capron v. Sprout*, 11 Nev. 304.

<sup>2</sup> *Bradbury v. Cronise*, 46 Cal. 287. And a lien has also been given for hauling ore. *In re Hope Min. Co.*, 1 Sawyer, 710.

operating the mine.<sup>1</sup> And a mine superintendent has a lien on the property of the company for which he is working,<sup>2</sup> for expenses incurred by him, which were to be borne jointly by the company, and he must proceed against the joint assets of the company for the payment of such expenses, before he can hold the individual assets of the different members of the company liable for the same.<sup>3</sup> But a superintendent employed simply to pay off the laborers and oversee the operation of the mine, will not be entitled to a lien upon the property of the company, for which he is working, for the payment of his salary, and he is not deemed a mine employee within the meaning of the statute creating miners' liens.<sup>4</sup>

§ 579. Same — Labor and materials. — Lien statutes, giving miners and material men liens upon mines, are liber-

<sup>1</sup> Wade's Am. Min. Laws, § 156, p. 223; *Duryea v. Burt*, 28 Cal. 569; *Blanchard & Weeks Ld. Cas.*, p. 489; *Mellior v. Valentine*, 3 Colo. 255.

<sup>2</sup> *Palmer v. Uncos Min. Co.*, 70 Cal. 614; *Helm v. Chapman*, 66 Cal. 291; *Sylvester v. Cal. Quartz Min. Co. (Cal.)*, 22 Pac. Rep. 217; *Quale v. Moon*, 48 Cal. 478. Also, see *Williams v. Santa Clara Min. Assn.*, 66 Cal. 193; *Hicks v. Murray*, 43 Cal. 515. And the lien extends generally to the personal estate of the owners. *Reed's App. 18 Pa. St. (6 Harris)*, 235. When the lien is given on "improvements," a coal mine is held to be an improvement. *Central Trust Co. v. Coal, I. & R. Co.*, 42 Fed. Rep. 106. And lien applies to "whole mine." *Sylvester v. Cal. Quartz Co.*, 80 Cal. 510.

<sup>3</sup> *Isaacs v. McAndrews*, 1 Mont. 437.

<sup>4</sup> *Smallhouse v. Ky. M. G. & S. M. Co.*, 2 Mont. 443; *Morrison's Min. Dig.*, p. 210, § 9. Lien dates from performance of last work. *Capron v. Sprout*, 11 Nev. 304. "But a party having contracted to erect smelting-works, the final completion of the contract (which was general, not specifying any particular buildings) being suspended for more than the statutory period for filing mechanic's lien, it was *Held*, upon the facts, that a renewal of the work after that period was not in continuation of the original contract." *Lunt v. Stephens*, 75 Ill. 507; *M. M. D. 211*. "A lien on a quartz mill, after it is completed, cannot be kept alive by occasional repairs." *Davis v. Alvord*, 94 U. S. 545; reversing *Alvord v. Hendrie*, 2 Mont. 115; *M. M. D. 211*.



ally construed,<sup>1</sup> and the laborer is entitled to its provisions, whether employed by the day or upon contract.<sup>2</sup> The superintendent<sup>3</sup> and foreman<sup>4</sup> are both entitled to the benefit of the statute; work on a building may be commingled with work upon the mine,<sup>5</sup> unless they are two separate parcels of property<sup>6</sup> and, generally, the material man is entitled to a lien for any material furnished and used, or to be used in and about the mine.<sup>7</sup> Machinery,<sup>8</sup> engines, ropes and lumber for derricks,<sup>9</sup> powder, steel and candles,<sup>10</sup> used in a mine; work done in drilling an oil well;<sup>11</sup> cutting wood<sup>12</sup> and hauling mineral,<sup>13</sup> have all been held to entitle the party furnishing the work or material to a lien. But the laborer's lien does not give him any right to sell the mineral of his employer, but only a lien upon his property,<sup>14</sup> and the lien is usually confined to the particular property benefited by the labor or material furnished.<sup>15</sup>

<sup>1</sup> *In re Hope Min. Co.*, 9 M. M. R. 364; *Skyrme v. Occidental Co.*, 9 *Idem*, 371.

<sup>2</sup> *Skyrme v. Occidental Co.*, *supra*; s. c. 8 Nev. 219; *Capron v. Sprout*, 9 M. M. R. 392.

<sup>3</sup> *Cullen v. Flagstaff Co.*, 9 M. M. R. 412. But see, *contra*, *Smallhouse v. Ky. Co.*, 9 *Id.* 388.

<sup>4</sup> *Capron v. Sprout*, *supra*.

<sup>5</sup> *Skyrme v. Occidental Co.*, *supra*; *Dickinson v. Bolyer*, 9 M. M. R. 415.

<sup>6</sup> *Davis v. Alvord*, 9 M. M. R. 384.

<sup>7</sup> *Keystone Co. v. Gallagher*, 9 M. M. R. 406.

<sup>8</sup> *Parrish v. Hazard's App.*, 83 Pa. St. 111.

<sup>9</sup> *Robson & Co.'s App.*, 62 Pa. St. 405.

<sup>10</sup> *Keystone Co. v. Gallagher*, *supra*. See, also, *Rapauno Chem. Co. v. G. & N. Ry. Co.*, 59 Mo. App. 6, where lien was given for powder used on railroad.

<sup>11</sup> *Vandergriff's App.*, 83 Pa. St. 127.

<sup>12</sup> *Bradbury v. Conise*, 46 Cal. 287.

<sup>13</sup> *In re Hope Min. Co.*, 1 Sawyer, C. C. 710. But see *Bernard v. McKenzie*, 9 M. M. R. 343, *contra*.

<sup>14</sup> *Granby Mining Co. v. Turley*, 9 M. M. R. 343.

<sup>15</sup> *Davis v. Alvord*, 9 M. M. R. 384; *Hieveller v. Redding*, 14 M. M. R. 654. One mining phosphate by the ton is not held entitled to the benefit

§ 580. **Same — Partners and cotenants.** — Each member of the firm, in a mining partnership, has a lien upon the property of the firm for debts due and money advanced by him for the firm,<sup>1</sup> and such lien may be enforced in a court of equity, although no agreement was had between the partners,<sup>2</sup> and the purchaser of the interest of the partner, who took with notice of the indebtedness, would buy subject to such lien.<sup>3</sup> A creditor's lien, however, is upon the entire property of the firm and upon no individual's interest therein,<sup>4</sup> and consequently a sale of an individual partner's interest, under execution, is not defeated by a lien of a firm creditor. But one tenant in common has no lien upon the common property for rents and profits, appropriated by a tenant in possession, the remedy, in such case, being a suit for an accounting.<sup>5</sup>

§ 581. **Prevented by assignment of debt.** — The statutory right of lien given to mine employees and other laborers, is held to be a mere personal right, given the laborer for his own protection, and the right to create it is waived by an assignment of the debt.<sup>6</sup> The weight of the later

of the South Carolina lien law. *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907. Lubricating oil and grease used to oil mining machinery are not such material as to afford a lien to the party furnishing same. *Holter Hdw. Co. v. Ont. Min. Co.* (Mont. 1900), 61 Pac. Rep. 8.

<sup>1</sup> *Durea v. Burt*, 28 Cal. 569.

<sup>2</sup> *Ante, idem.* *Fereley v. Whitewick*, 11 M. M. R. 247.

<sup>3</sup> *Durea v. Burt, supra.*

<sup>4</sup> *Beatty's App.*, 9 M. M. R. 346. An agreement for division of mineral oil by a pipe line company destroys partner's lien. *Childers v. Neely*, (W. Va.), 34 S. E. Rep. 828.

<sup>5</sup> *Stenger v. Edwards*, 70 Ill. 631. But, *contra*, as to lien for improvements on the common property, *idem*; *s. c.* 9 Mor. Min. Rep. 368.

<sup>6</sup> 2 Jones on Liens, Secs. 1493-4; *Davis v. Biesland*, 18 Wall. 659; *Tewksberry v. Bronson*, 48 Wis. 581; *Brown v. Harper*, 4 Oregon, 89; *Merchant v. Water Power Co.*, 54 Iowa, 451; *Brown v. C. S. F. & Cal. Ry. Co.*, 36 Mo. App. 458; *Pearsons v. Tinker*, 36 Me. 384; *Ruggles v. Walker*, 34 Vt. 468.

authorities, at least, bears out this proposition, although it was formerly held, in some of the States, that the assignment of the debt would not operate to defeat the right of lien, in favor of the assignee of the account for the work performed or materials furnished.<sup>1</sup> But though it is perhaps the settled rule of law that an assignment of the debt will defeat the right of lien, the mere giving of an order by the laborer to another on his employer, for the amount of his debt for which the lien would obtain, would not defeat the right of lien,<sup>2</sup> for this could not be construed as an assignment of the personal right to file the lien, but is rather in the nature of a demand, through another, for the amount of money owing to the laborer. A distinction is also recognized by the courts between an assignment of the debt, before the filing of the lien, and an assignment made after the filing of the lien by the laborer who performed the work,<sup>3</sup> and although the lien is defeated by an assignment made before the filing of the lien, an assignment made after the filing of the lien has been held not to impair the right of lien and the assignee of the debt secured by the lien, being subrogated by the assignment to the rights possessed by his assignor, can still enforce the payment of his debt by the enforcement of the lien.<sup>4</sup>

<sup>1</sup> *De Witt v. Smith*, 68 Mo. 263; *Jones v. Hurst*, 67 Mo. 568; *Morgan v. Railroad*, 76 Mo. 161. See also *Skyrme v. Occidental &c. Co.*, 8 Nev. 219, and *Capron v. Sprout*, 11 Nev. 304.

<sup>2</sup> *Hinsley v. Buchanan*, 5 Watts (Pa.), 118; *Dane v. Clinton*, 2 Utah, 417; *Fisher v. Rush*, 71 Pa. St. 40; *Bashor v. Nordyke & Mormon Co.*, 25 Kan. 155; *Gore v. Cushing*, 5 Bush (Ky.), 304.

<sup>3</sup> *Goff v. Papin*, 34 Mo. 177; *Ashdown v. Woods*, 31 Mo. 465. Assignee of claims may file lien under Iowa statute. *Mitchell v. Burwell*, 81 N. W. Rep. 198.

<sup>4</sup> See *Jones v. Hurst*, 67 Mo. 568, where the assignee in addition to the right of lien held an accepted draft covering the same debt, Hough, J., observing "After the lien was filed, therefore, Embree as assignee of

§ 582. **Time for filing lien.**—The time within which a lien must be filed for work done, or materials furnished, is to be computed from the time when the work was completed, or the date when the materials were furnished, under the contract.<sup>1</sup> The notice of intention to file the lien can be filed at the same time as the lien account, if it is done before the commencement of the suit,<sup>2</sup> and the lien must always be filed within the proper statutory period, commencing at the time when the last work was performed, or the last materials were furnished under the contract, and extending to the time of filing the lien.<sup>3</sup> The lien can be filed within any time during the statutory period,<sup>4</sup> but if it is not filed within the time allowed by statute, the lienor has waived his right to claim the lien.<sup>5</sup> But where the work is performed on different structures on the same

the debt secured by the lien \* \* \* had an unquestionable right to enforce the lien in his own name; also *McMurray v. Taylor*, 80 Mo. 268. "Where miners were employed in working a developed mine, running tunnels, cross-cuts, winzes, etc., sometimes being paid by the day, and sometimes taking small contracts for particular parts of the work at so much per foot: *Held*, that they were not required to file a lien separately for each period of days' labor and each contract of the kind referred to, but that the whole would be considered as a continuous employment, from the final termination of which only the limitation for filing a miners' lien would begin to run. *Skyrme v. Occidental Mill & M. Co.*, 8 Nev. 220; *M. M. D.* 211.

<sup>1</sup> *Sparks v. Butte Gravel Min. Co.*, 55 Cal. 389; *Dingley v. Green*, 54 Cal. 333; *Bartlett v. Kingon*, 19 Pa. St. 341; *Catlin v. Douglass*, 33 Fed. Rep. 569; *Conroy v. Perry*, 26 Kan. 472.

<sup>2</sup> The time for giving notice is purely statutory. See *Stimp. Am. Stat.*, § 1967. It must be served on the owner or his agent. *Malone v. Big Flat Gravel Co.*, 76 Cal. 578. As to sufficiency of notice, see *Cal. Powder Works v. Con. Hy. G. Mines (Cal.)*, 22 Pac. Rep. 391.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Welch v. Porter & Co.*, 68 Ala. 225; *Mulloy v. Lawrence*, 31 Mo. 588. It is a question of fact whether the lien is filed in time or not. *Driesbach v. Keller*, 2 Pa. St. 77.

<sup>5</sup> *Patrick v. Foulke*, 45 Mo. 312; *Brown v. Moore*, 26 Ill. 421.

tract of land, and under one continuous employment, the time is to be computed from the date when the whole work was completed,<sup>1</sup> and where the work is not done under one continuous contract, but is performed under different employments, the lien in such cases is held to be divisible, and if an account is filed within the statutory period for part of the work done, the lien will attach to the property for the work performed within that time, but not for work previously done.<sup>2</sup>

§ 583. **Character of work necessary.**—It must ordinarily appear that the work for which the lien is filed was performed under one and the same employment,<sup>3</sup> and that the statutory period has not elapsed, intervening the completion of the work for which the lien is claimed, and the time at which he claimed his right of lien.<sup>4</sup> It is not necessary to file separate liens, however, for work done under separate contracts, if the same was performed under one continuous employment and upon the same property,<sup>5</sup> and when one lien is filed for work done under separate contracts, if the work is for the same employment, the time within which the laborer must file his lien will not begin to run until the final completion of the work performed on the last contract.<sup>6</sup> But while one can claim under one lien for all the work performed under one continuous employment, on the same parcel of property, a

<sup>1</sup> *Silvester v. Cal. Quartz Min. Co.*, 80 Cal. 510; 22 Pac. Rep. 217.

<sup>2</sup> *Gurney v. Walsham (R. I.)*, 19 Atl. Rep. 323.

<sup>3</sup> *Mellor v. Valentine*, 8 Colo. 255; *Hafer's App.*, 116 Pa. St. 360.

<sup>4</sup> *Sanford v. Frost*, 41 Conn. 617. If additional work is done at owner's request, this would extend time for filing the lien. *McAntire v. Trautner*, 63 Cal. 420; *Harman's App.*, 124 Pa. St. 624.

<sup>5</sup> *Skyrme v. Occidental &c. Co.*, 8 Nev. 219; *Capron v. Sprout*, 11 Nev. 304.

<sup>6</sup> *Ante, idem.*

laborer cannot claim under one lien for work performed on different parcels of property, even though the work was performed on the different parcels of property under the same contract and one continuous employment.<sup>1</sup>

§ 584. **Character of owner's title.** — The laborer must generally proceed against the party who holds the legal title to the property against which the lien is filed, and all should be made parties to the suit who are interested in the property, or whose rights would be, in any way, affected by the enforcement of the lien;<sup>2</sup> but the mere fact that a part of the title to the property to be charged is in others than the party sued, will not defeat the lien as against the party who is sued,<sup>3</sup> and if the party who is sued really possesses the legal title to the property his liability will not be affected by the mere fact that he only holds the legal title as trustee for his partners,<sup>4</sup> for the fact of ownership by the other members of the firm does not affect the liability of the party who was sued. and the laborer can

<sup>1</sup> *Davis v. Alvord*, 94 U. S. 545; reversing *Alvord v. Hendrie*, 2 Mont. 115; *Wade's Am. Min. Laws*, p. 223. Items for extra work may be included if the contract stipulates for extra work. *Pullis v. Happon*, 28 M. A. 666; *Rush v. Able*, 90 Pa. St. 153; *Murray v. Barrow*, 11 Allen (Mass.), 152. And if such work is substituted for work done under the contract it will have the effect of extending the time for filing the lien. *McKelvey v. Jarvis*, 87 Pa. St. 414.

<sup>2</sup> *Hooper v. Flood*, 54 Cal. 218; *Clark v. Brown*, 22 Mo. 140; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193; *Foster v. Woolfing*, 20 Mo. 85; *Sullivan v. Decker*, 1 E. D. Smith (N. Y.), 699.

<sup>3</sup> *Brown v. Wright*, 25 Mo. App. 54.

<sup>4</sup> *Clark v. Morning*, 4 Ill. App. 649. But both the trustee and *cestui que trust* should be made parties. *Bayard v. McGraw*, 1 Ill. App. 134; 96 *Id.* 147; 6 Ill. App. 621. Lien will not lie for work done for a trespasser, against owner's property. *Idaho G. M. Co. v. Winchell* (Idaho), 59 Pac. Rep. 533. No lien will lie for labor or materials furnished purchaser in possession under contract to purchase mine. *Maher v. Schull*, 11 Colo. App. 822; 52 Pac. Rep. 1115.

recover as against the holder of the legal title, even though he had knowledge of the trust.<sup>1</sup> Nor would the rights of a laborer upon a claim be affected by the fact that the property had not, at the time of filing the lien, been transferred by patent from the government to the claimant.<sup>2</sup> The lien would obtain just as though he had a fee-simple title to the land, and it is immaterial, so far as the lienor's rights are concerned, whether the owner has a patent from the government, or whether he holds under one of the old Spanish grants, he can still exercise his right of lien given him by the statute.<sup>3</sup>

§ 585. *Same — Against lessee.* — Notwithstanding a lessee, at the end of his term, or on forfeiture, can remove machinery and improvements erected by him, while annexed to the land, they constitute such a portion of the estate as to be subject to a laborer's or materialman's lien,<sup>4</sup> and upon a judgment for such a debt, the estate of the lessee and the improvements erected by him upon the land could be sold under execution.<sup>5</sup>

<sup>1</sup> *Rosina v. Trowbridge*, 20 Neb. 105; 17 Pac. Rep. 751.

<sup>2</sup> Cal. Code Civil Proc., § 1183.

<sup>3</sup> *Bewick v. Minn.*, 88 Cal. 368; 28 Pac. Rep. 389.

<sup>4</sup> *Dobschuetz v. Holliday*, 6 M. M. R. 108; *Rogers v. Mining Co.*, 75 Mo. App. 114. Under Colorado lien law no lien will lie against a leasehold to a mine. *Laws Colo.* 1895, p. 202; *Morrell Hdw. Co. v. Princess Gold Min. Co.*, 68 Pac. Rep. 807.

<sup>5</sup> The right to file lien against leasehold is recognized in *Rogers v. Mining Co.*, 75 Mo. App. 114, a well-considered opinion by Judge Bland. *Mitchell v. Burwell*, 110 Iowa, 10; *Post v. Fleming* (N. M.), 68 Pac. Rep. 1087; *Gardner v. Resumption Co.*, 4 Colo. App. 271. But see *United Mines Co. v. Hatcher*, 49 U. S. App. 139; *Pelton v. Minah Con. Co.*, 11 Mont. 281; 20 Am. & Eng. Enc. Law (3 Ed.), 792; *Griffin v. Hurley* (Ariz. 1901), 65 Pac. Rep. 147; *Reese v. G. M. Co.*, 133 Cal. 285. A lessor's estate cannot be charged for materials or labor furnished a lessee, although mill or mining plant on premises erected by lessee were to become the lessor's property, at the end of the term. *Antlers Park Mining Co. v. Cunningham* (Colo. 1902), 68 Pac. Rep. 226.

§ 586. **Same — Will not lie against improvements made by licensee.** — The lien for improvements made upon mining property is, generally, given only against the real estate, or an interest therein, and before the lien will lie the party making the improvement must have an interest in the realty, unless otherwise provided by statute.<sup>1</sup> Accordingly, where the mining improvements are made by one having no interest or possession in the realty, but only a license to mine, under a set of mining rules, the lien would not lie for improvements made by him, under his license.<sup>2</sup>

§ 587. **To what property lien attaches.** — The special lien of a mine employee, or other laborer, attaches generally to the products of his own labor, wherever it may be found, and where the labor performed or material is furnished the same person, upon the same tract of land and under one continuous employment, the lien will ordinarily attach to the whole tract of land upon which the labor is performed and for the full value of the labor or materials furnished.<sup>3</sup> And although the laborer cannot claim under one lien for work performed on different tracts of land,<sup>4</sup> where the work for which the lien is claimed was performed upon the same tract of land, the lien is not con-

<sup>1</sup> *Steineger v. Beaman*, 28 Mo. App. 594.

<sup>2</sup> *Foundry Co. v. Cole*, 180 Mo. 1; *Richardson v. Koch*, 81 Mo. 264; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249; 52 Amer. Rep. 917; *Cooper v. Johnson*, 148 Mass. 108. *Richardson v. Koch*, *supra*, is criticised in *Press Brick Co. v. Quarry Co.*, 151 Mo., p. 517. But in Oregon the owner of exclusive license is held subject to lien, the same as lessee. *Stinson v. Hardy*, 27 Oreg. 584; 41 Pac. Rep. 116. The legislature of Missouri, in 1901, passed an act giving a lien against improvements of a licensee. See Acts Missouri for 1901, p. 206.

<sup>3</sup> See *Hart's App.* 96 Pa. St. 355; 11 Am. & Eng. Ry. Cas. 516; *Willamette &c. Co. v. Remick*, 1 Or. 169.

<sup>4</sup> *Davis v. Alvord*, 94 U. S. 545; *Wade's Am. Min. Laws*, p. 223, § 156.



fined to such separate structure on the mining claim or lot, but will attach to such property as a whole,<sup>1</sup> even though the work was performed under different contracts and upon separate structures erected on the property. But the special lien of a mine employee or other laborer, will usually only apply to the products of his own labor and in the foreclosure of his lien he is not, generally, entitled to participate in the proceeds of other personal property, even though such property was included in his foreclosure, and at the time of deciding the issues was before the court for distribution.<sup>2</sup> And the lien is also confined exclusively to the interest of the employer in the property, or to the interest of those with whom the lienor has had contractual relations, and although it attaches to the entire interest of such parties in the mine, to the mining machinery and fixtures and everything used in and about the mine,<sup>3</sup> the lien could not attach to such property as the

<sup>1</sup> *The Dugan Cut Stone Co. v. Grey*, 114 Md. 497; *Beatley v. Parker*, 141 Mass. 523; *Henry v. Apgar*, 93 N. Y. 531. But the lien will not apply to boilers, engines and machinery erected on leased property with a power of removal reserved in the lessee, for unless the same were in the construction of the buildings or improvements, or were afterwards permanently connected therewith and annexed to the realty, they are mere personal property and do not pass with the realty. *Richardson v. Koch* (a leading case), 81 Mo. 264; *White's App.*, 10 Pa. St. 252; *Thomas v. Davis*, 76 Mo. 72; *Baylles v. Linex*, 21 Ind. 45; *Ranson v. Sheahan*, 78 Mo. 668; *Collins v. Mott*, 45 Mo. 100; *contra*, *Allen v. Frumet Min. & Smel. Co.*, 73 Mo. 688; *McGregory v. Osborne*, 9 Cal. 119; *Morgan v. Arthurs*, 8 Watts (Pa.), 140; 5 Watts, 115.

<sup>2</sup> *Haenssler v. Missouri Glass Co.*, 52 Mo. 452; *Parrish's App.*, 88 Pa. St. 111. "An architect filed a lien for the erection of 'a hoisting and dumping cage' over a leased coal mine in Schuylkill County, against the entire leasehold interest: *Held*, that his lien was confined, under the act of Feb. 17, 1855, to the specific improvement which he had erected, and that his failure so to restrain it rendered his lien null and void." *St. Clair Coal Co. v. Martz*, 75 Pa. St. 384; *Morrison Min. Dig.*, p. 211, § 16.

<sup>3</sup> *Vandegriff's App.*, 83 Pa. St. 127; *Robson & Co.'s App.*, 62 Pa. St. 405; *Tibbetts v. Moore*, 23 Cal. 208; *Morrison's Min. Dig.*, p. 221.

lessor owned in or about the mine when the contract of employment had been with the lessee alone, for his property alone could be held for the payment of such a debt.<sup>1</sup>

§ 588. Same — Character of improvements and nature of annexation essential. — If the character of the improvements, or the nature of the material furnished, is such as would come under the class of fixtures, known as trade fixtures, since the intention of the parties in the case of such annexations is usually to regard the same as personal property, a lien is not generally given for such improvements.<sup>2</sup> But where the improvements that are annexed are portions of one complete plant, although from different

<sup>1</sup> *Hopkins v. Hudson* (Ind.), 5 West. 312; *Barclay v. Wainwright*, 86 Pa. St. 191; *McMahan v. Vichey*, 4 Mo. App. 225; *Knapp v. Brown*, 45 N. Y. 207; *Judson v. Stephens*, 75 Ill. 255; *Johnson v. Dewey*, 36 Cal. 623. And the same rule obtains where the improvements are made by the under tenant of the lessee. *Francis v. Sayles*, 101 Mass. 435.

<sup>2</sup> *Ewell's Fxt.* 288; *Meek v. Parker*, 63 Ark. 367; *Oves v. Oglesby*, 7 Watts (Pa.), 106; *Foundry Co. v. Cole*, 130 Mo. 1; *Richardson v. Koch*, 81 Mo. 264; *Heidegger v. Atlantic Co.*, 16 Mo. App. 327; *Haskin Vulcanizing Co. v. Cleveland Co.*, 26 S. E. Rep. 878; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1. "An iron furnace company intending to improve and enlarge the works, contracted, before July 16, 1872, with several different manufacturers for various parcels of the heavy machinery and fixtures intended to be erected, and on that day laid the foundation of the boiler stack. The several contractors had also begun the manufacture of the parcels of machinery. On July 17, 1872, the premises were mortgaged: *Held*, that the lien for such improvements was anterior to the mortgage, although they were not brought on the premises until months after; and that from the preparations made, the mortgagee had due notice that the improvements were 'additions of material parts' to the original structure." *Parrish & Hazard's App.*, 83 Pa. St. 111; *M. M. D.* 211. "A track on the slope of a coal mine is a temporary structure and not an 'improvement' or 'fixture' under the lien act of Feb. 17, 1858, and is not liable to mechanics' lien. Act construed." *Easterley's App.*, 54 Pa. St. 192; *M. M. D.* 211. "An oil well is held to be a 'structure' within the Indiana lien law, giving lien for material furnished house, mill, 'structure,' etc." *Haskell v. Gallagher*, 30 Ind. App. 224; 50 N. E. Rep. 485.

parties and in different parts, and are erected by one having an interest in the realty and not for transient use or removal, they would become a portion of the realty and, as such, subject to a mechanic's lien.<sup>1</sup>

<sup>1</sup> *Press Brick Co. v. Machine Co.*, 151 Mo. 501; *Kemper v. King*, 11 Mo. App. 116; *Wolfert v. St. Louis*, 115 Mo. 144; *Lindsay v. Gunning*, 59 Conn. 296; *Lannon's App.*, 8 Pa. 473; *Bodley v. Denmead*, 1 W. Va. 249; *Edwards v. Derrickson*, 28 N. J. Law, 39; *Linden Co. v. Mfg. Co.*, 158 Pa. St. 288; *Salt Lake Co. v. Ibex Mine & Smelting Co.*, 15 Utah, 440; *Cary Co. v. McCarty*, 50 Pac. Rep. 744. "Does not operate to give priority against a mortgage recorded before work commenced." *Preston v. Sonora Lodge*, 39 Cal. 116; *M. M. D.* 212. "A party employed on a mine at a stipulated rate per day, payable monthly, who was employed prior to the execution of a mortgage on the premises, holds his lien subject to the lien of the mortgage, from the end of the current month during which the mortgage was recorded." *Capron v. Sprout*, 11 Nev. 304; *M. M. D.* 211. A coal mine is an improvement. 42 Fed. Rep. 106. A lien will not lie for boilers, engines, etc., used at a mine, but not annexed to, or connected with the real estate as a permanent improvement, under the Missouri lien law. *Meistrel & Co. v. Roach*, 56 Mo. App. 243; *Mo. Valley Cut Stone Works v. Brown*, 50 Mo. App. 407; *Springfield Found. & Mach. Co. v. Cole*, 130 Mo. 1. A lien for labor will not extend to machinery simply piled on the land and not attached to or used in the mine. *Hamilton v. Delhi Min. Co.*, 118 Cal. 148.

## CHAPTER XI.

### PARTITION OF MINES.

#### SECTION 589. Nature and extent of right.

- 590. Governed by *lex loci*.
- 591. What title will justify.
- 592. Title to ore, in place.
- 593. Life tenant may maintain.
- 594. Incorporeal right not subject to.
- 595. Partner not entitled to — Co-owner may have partition.
- 596. Same — May partition by consent.
- 597. Same — Not incident to an accounting.
- 598. Partners as to government mining claims.
- 599. Same — Rule in Federal courts.
- 600. Manner of decreeing.
- 601. Of water right impracticable.
- 602. Right to, may be waived.

§ 589. **Nature and extent of right.** — When opened, mines are in their very nature incapable of being equally divided<sup>1</sup> on account of the unknown, fluctuating value of the property.<sup>2</sup> Partition cannot be made of the minerals in the same way that the surface can be set off by metes and bounds, for the quantity and value of the ore deposits; the approach thereto and the facility with which they can be worked, cannot be judged, even by the most scientific, by the character of the soil or subsoil at the surface.<sup>3</sup> For these reasons and because, generally partition must usually result in a sale of the property,<sup>4</sup> the courts will require full information as to the relations of the parties to the property and are slow to decree partition of such prop-

<sup>1</sup> *Lenfers v. Henke*, 73 Ill. 405.

<sup>2</sup> *Ante, idem.* *Strettell v. Bollan*, 8 McCrary, 46; *Aspen M. & S. Co. v. Rucker*, 28 Fed. Rep. 220; *Conant v. Smith*, 1 Alken (Vt.), 67.

<sup>3</sup> *Adam v. Briggs Iron Co. (Mass.)*, 7 Cush. 361.

<sup>4</sup> *Aspen M. & S. Co. v. Rucker*, *supra*.

erty, as the decree usually results in practically dispossessing one or more of the parties.<sup>1</sup>

§ 590. **Governed by *lex loci*.** — The action of partition in most of the United States is governed, as to form and practice, by special statute, which should be consulted by the practitioners of the several mining States. The jurisdiction of the Federal courts is held to exist independently of such statutes.<sup>2</sup> But in its very nature the suit is a local proceeding, and can only be enforced in a court, and according to the procedure of the jurisdiction in which the land is located.<sup>3</sup>

§ 591. **What title will justify.** — Any estate in mining land, or minerals, which could be considered real estate of inheritance is subject to an action of partition,<sup>4</sup> and it is immaterial whether the owners are in possession or not.<sup>5</sup> If there is an outstanding mining lease, division would be made between the co-owners, subject to the right of the tenant,<sup>6</sup> and any unauthorized working, by either the defendant or his tenant, pending the partition suit, would be enjoined by the court.<sup>7</sup> But a mere possessory title is not sufficient

<sup>1</sup> *Aspen M. & S. Co. v. Rucker*, *supra*; *Adam v. Briggs Iron Co.*, 7 Cush. 361. "The court will not order a partition of an ore bed whose value cannot be ascertained, and of different richness in different parts; nor will it order an enjoyment thereof in rotation, nor a sale though authorized by statute. The remedy of cotenants is in chancery, which can restrict the owners to their respective interests, order accounts, or appoint a receiver." *Conant v. Smith*, 1 Aiken (Vt.), 67; M. M. D. 254.

<sup>2</sup> *Strettell v. Bollen*, 11 M. M. R. 220; *Aspen Min. Co. v. Rucker*, 28, Fed. Rep. 220.

<sup>3</sup> *Godfrey v. White*, 11 M. M. R. 562.

<sup>4</sup> *Hughes v. Devlin*, 23 Cal. 502; *Canfield v. Ford*, 28 Barb. 336.

<sup>5</sup> *Haenssler v. Missouri Iron Co.*, 110 Mo. 188.

<sup>6</sup> *Haenssler v. Mo. Iron Co.*, *supra*.

<sup>7</sup> *Rainey v. Frick Coke Co.*, 73 Fed. Rep. 389.

to support the action; <sup>1</sup> a title to a portion of the real estate is essential in every case, unless otherwise provided by statute, <sup>2</sup> and the court will not, in any case, order partition in kind, except when the value of the parts can be ascertained. <sup>3</sup>

§ 592. Title to ore in place. — A conveyance by the surface owner, of the ore in place, under a given tract of land, to one and his heirs and assigns, with surface rights necessary to enable the mineral owner to excavate and remove the ore, creates an estate of inheritance in such ore, in the grantee, and he can maintain partition of his interest. <sup>4</sup> But before the title to the ore has been severed from the surface title, as it is impossible to ascertain its value, or extent, <sup>5</sup> a court would not, ordinarily, order the mineral and the surface to be divided and appraised separately. <sup>6</sup>

<sup>1</sup> *Strettell v. Bollan*, 8 McCrary, 46.

<sup>2</sup> *Boston Franklinite Co. v. Condit*, 19 Equity, 394; *Strettell v. Bollan*, 8 McCrary, 46; *Aspen M. & S. Co. v. Rucker*, 28 Fed. Rep. 220.

<sup>3</sup> *Conant v. Smith*, 1 Aiken (Vt.), 67; *Christie's App.*, 110 Pa. 538; *Lenfers v. Henke*, 78 Ill. 405; *Adam v. Briggs Co.*, 7 Cush. (Mass.) 361. "A partition of lands, containing mineral deposits, cannot be ordered if the location, extent and value of such deposits cannot be ascertained." *Kemble v. Kemble*, 44 N. J. Eq. 454.

<sup>4</sup> *Canfield v. Ford* (N. Y.), 28 Barb. 336. "A conveyance of all the mines, ores, and minerals in certain lands, and all the interest of the grantor therein, and the right of ingress and egress to get the same, etc., is a grant of an estate of inheritance, is a certain grant, and may be the subject of partition." *Canfield v. Ford*, 28 Barb. 336; M. M. D. 255.

<sup>5</sup> *Conant v. Smith* (Vt.) 1 Aiken, 67. "The owner of the surface is not a necessary party to proceedings for partition between tenants in common, of minerals." *Canfield v. Ford*, 28 Barb. 336; M. M. D. 255.

<sup>6</sup> *Christy's App.*, 110 Pa. 538. Where title to minerals is severed from surface partition of surface can be made as though there was no mineral underneath. *Smith v. Jones* (1900), 21 Utah, 370; 60 Pac. Rep. 1104. Mineral may be divided, although partition of land refused. *Coleman v. Coleman*, 19 Pa. St. 100; *Coleman's App.*, 62 *Idem*, 252; *Ames v. Ames*, 160 Ill. 590. But see *Christy's App.*, 110 Pa. St. 538.

§ 593. **Life tenant may maintain.** — As to opened mines, or quarries, as tenants for life have the right of working the known deposits, they are entitled to partition of the several interests, if divisions cannot be agreed upon,<sup>1</sup> and under the English Settled Land Act, a life tenant is entitled to make partition or exchange, either with or without a reservation of the mines or minerals in the land.<sup>2</sup> But in the absence of statute or a special power, no such authority would be recognized in the United States, and reservations made under a power would go to the remainderman.<sup>3</sup>

§ 594. **Incorporeal right not subject to.** — A mere incorporeal right, as a license to take ore from the land of another, although enjoyed by two or more parties, is not the subject of partition,<sup>4</sup> either at the instance of the original licensees,<sup>5</sup> or their grantees.<sup>6</sup> Such an estate is a mere right to take the minerals, upon the conditions granted; does not include an exclusive right to any definite portion of the land, so as to make the parties enjoying such a right,<sup>7</sup> or the grantor and such parties, co-owners; is a mere incorporeal hereditament and, in its nature, is incapable of partition.<sup>8</sup>

<sup>1</sup> *Clavering v. Clavering*, 14 M. M. R. 358; *Neel v. Neel*, 14 M. M. R. 368; *Gaines v. Green Pond Co.*, 15 M. M. R. 158; *Lynn's App.*, 15 *Idem*, 126; 81 Pa. 44.

<sup>2</sup> *MacSwinney on Mines, etc.*, pp. 180, 181; *Doran v. Wiltshire*, 8 Swanst. 699.

<sup>3</sup> *Bassett v. Bassett*, 14 M. M. R. 359; *Briggs v. Davis*, 14 *Idem*, 585.

<sup>4</sup> *Smith v. Cooley*, 65 Cal. 46.

<sup>5</sup> *Ante, idem*.

<sup>6</sup> *Boston Franklinite Co. v. Condit*, 19 Eq. 394; *Hartford Co. v. Miller*, 14 Conn. 112.

<sup>7</sup> *Smith v. Cooley, supra*.

<sup>8</sup> *Smith v. Cooley, supra*; *Omaha &c. S. & R. Co. v. Tabor*, 13 Colo. 41; *Springfield F. & M. Co. v. Cole*, 130 Mo. 1.

§ 595. **Partner not entitled to — Co-owner may have partition.** — Generally, a partner in an ordinary mining partnership is not entitled to partition of the firm property, since a partner, as such, has no estate in any distinct moiety of the firm property, but the common title is in the firm.<sup>1</sup> But co-owners who are also partners in the working of the mine are entitled to partition either before<sup>2</sup> or after dissolution,<sup>3</sup> as the right to such, as an owner of a distinct estate, would not be prevented by the mere partnership in the working. And a co-owner simply is entitled to partition in every case,<sup>4</sup> except where a sale would be more practical.<sup>5</sup>

§ 596. **Same — May partition by consent.** — But while a partner is not held usually to be entitled to partition, for

<sup>1</sup> *Wilde v. Milne*, 26 Beav. 504; *contra*, *Hughes v. Devlin*, 23 Cal. 502; 12 M. M. R. 242.

<sup>2</sup> *Wilde v. Milne*, *supra*. But see, *contra*, *Crawshaw v. Maule*, 1 Simons, 518; *Stewart v. Blakeley*, 4 Ch. 609.

<sup>3</sup> *Ante*, *idem*.

<sup>4</sup> *Wilde v. Milne*, *supra*; *MacSwinney on Mines*, &c., p. 130.

<sup>5</sup> *Ante*, *idem*. "The grantee of the right to dig ores, claiming his right by the deed of one of two or more tenants in common of the entire estate, cannot compel partition." *Boston Franklinite Co. v. Condit*, 19 N. J. Ch. 394; M. M. D. 256. In partition in kind between cotenants, improvements should be allowed to the tenant who made them. *Polk v. Gunther*, 107 Tenn. 16; 64 S. W. Rep. 25. In partition between cotenants, injunction should issue to protect property if cotenant is working same. *Rainey v. Fricke Coke Co.*, 73 Fed. Rep. 389. "It was stipulated that if the lessors should wish, at the expiration of the lease, to hold the improvements, they should pay the lessees 'a fair valuation for the said improvements, and they have no right to remove them.' Held, that the houses erected on the land by the lessees belonged to them, with an option to the lessors to purchase, and, the lessors having failed to exercise that option, the lessees who subsequently acquired an interest in the land, are entitled in a partition to have that part of the land on which the houses are situated allotted to them, as it can be done equitably." *Brinkmeyer et al. v. Rankin* (Court of Appeals of Kentucky, April 11, 1901); 61 S. W. Rep. 1007.



the reason that each and every moiety is vested in the firm and no individual member to any definite portion, if the partners agree among themselves to the specific interest in the firm property to be held by each member and all consent thereto and an allotment is made to each member of the portion going to each, if followed by exclusive possession of the several parcels, such partition would be upheld; <sup>1</sup> all relations of trust and confidence would terminate, the parties would cease to be cotenants and forever after deal at arm's-length.<sup>2</sup>

§ 597. **Same — Not incident to account.** — Although partition may be made by common consent between copartners, it has been held that it is not incidental to a suit for a partnership accounting notwithstanding the partners in such suits are to be entitled to a disposal and distribution of the firm assets.<sup>3</sup> The real estate of the partnership would be left as a distinct tenancy in common and the cotenants, in a separate independent suit brought for that purpose, would be entitled to have it partitioned.<sup>4</sup>

§ 598. **Same — Partners as to government mining claim.** — The reasoning of the preceding paragraph and

<sup>1</sup> 420 Mining Co. v. Bullion Co., 11 M. M. R. 608; Godfrey v. White, 11 M. M. R. 562. "A parol partition of a mining claim is 'doubtless' valid." 420 M. C. v. Bullion M. Co., 3 Saw. 634; M. M. D. 254.

<sup>2</sup> *Ante, idem.* A parol partition of surface will not include mineral if it was not so intended. Byers v. Byers, 188 Pa. St. 509; 39 L. R. A. 537.

<sup>3</sup> Godfrey v. White, 11 Mor. Min. Rep. 562.

<sup>4</sup> *Ante, idem.* "An executory contract to convey to an agent a certain interest in mining lands which he has purchased or assisted in purchasing in the name of his principals, does not give such party any such estate, although coupled with actual possession, as to enable him to maintain suit for partition." Seltzinger v. Ridgway, 4 W. & S. 472; M. M. D. 255.

the English authorities cited would seem to apply to a partnership in a claim on the public land,<sup>1</sup> but some of the courts of the Western mining States have held that the fact that a mining claim was worked by a partnership, would not prevent partition, where no settlement or accounting of the partnership was necessary,<sup>2</sup> but the claim could be partitioned as other real estate.<sup>3</sup> However, other courts hold that no partition would be required, in any case, as to such property, either as to partners<sup>4</sup> or cotenants.<sup>5</sup>

§ 599. **Same — Rule in Federal courts.** — The view expressed in the preceding section as to a lack of jurisdiction, in any case, to award partition of a government mining claim, is the rule that obtains in the Federal courts, before patent granted, as a mere possessory title will not give such courts jurisdiction.<sup>6</sup> However, as most of the Western States have provided, by statute, for partition of such claims, between joint owners, and Federal courts can administer any equitable title or right, given by a State

<sup>1</sup> *Godfrey v. White*, 11 M. M. R. 562, where it is held not an incident to an accounting by partners.

<sup>2</sup> *Hughes v. Devlin*, 12 M. M. R. 242; *Dall v. Confidence Co.*, 11 M. M. R. 214; *Strettle v. Ballon*, 11 *Id.* 220.

<sup>3</sup> *Ante, idem.*

<sup>4</sup> *Lenfers v. Henke*, 5 M. M. R. 68; *Conant v. Smith*, 11 M. M. R. 199; *Godfrey v. White, supra.*

<sup>5</sup> *Boston Co. v. Condit*, 14 M. M. R. 301; *Conant v. Smith, supra.*

<sup>6</sup> "When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property." *Hughes v. Devlin*, 23 Cal. 501; B. & W. L. C. 311; M. M. D. 255. No parol partition results from an agreement to divide a mining claim, upon the public land, although joint possession is retained; the patentee is trustee for the co-owners and they have but an equity to enforce. *Mullins v. Butte Co. (Mont.)*, 65 Pac. Rep. 1004.

<sup>7</sup> *Strettle v. Ballon*, 3 McCrary, 46.

statute, it is difficult to see why jurisdiction of Federal courts should be denied, in such cases, and a resort to State courts the only remedy for the enforcement of a statutory right, where the other essentials to Federal jurisdiction exist.<sup>1</sup>

§ 600. **Manner of decreeing.** — When a partition of mines is ordered, if it is possible to divide the property, in kind, between the owners, this will be done, where it will best subserve the interests of the several parties.<sup>2</sup> If impossible, or impracticable to decree a partition in kind, a sale of the property and division of the proceeds will be directed.<sup>3</sup> Sometimes it is found necessary to order a special partition, directing a division of the profits, or the alternate enjoyment of the common property, as the circumstances of the case may require and the different interests be best subserved,<sup>4</sup> and if the parties are unable to agree upon a plan of working<sup>5</sup> a receiver will sometimes be appointed to operate the mine and divide the profits, pending the final orders and disposition of the property.<sup>6</sup>

§ 601. **Of water right impracticable.** — In the case of water rights the same objection can be urged to partition

<sup>1</sup> *Aspen Mining & Smelting Co. v. Rucker*, 28 Fed. Rep. 220.

<sup>2</sup> *Crawshay v. Maule*, 1 Swanst. 518; *Collingwood v. Jenison*, Sel. 1082.

<sup>3</sup> *Wild v. Milne*, 26 Beav. 504.

<sup>4</sup> *Adam v. Iron Co. (Mass.)*, 7 Cush. 361. "Partition of a mine cannot be made by metes and bounds. They are to be otherwise parted by alternate enjoyment, or division of profits, as the circumstances may require." *Adam v. Briggs' Iron Co.*, 7 Cush. 361; M. M. D. 255.

<sup>5</sup> *Lees v. Jones*, 8 Jur. (N. s.) 954.

<sup>6</sup> *MacSwinney Mines, etc.*, p. 111; *Porter v. Lopes*, 7 Ch. D. 358; *Ex parte Cambrian Co.*, 14 Ch. D. 653; *Roberts v. Eberhardt, Kay*, 148-159. Where actual partition can be made of a mine it will be made in preference to a sale. *Royston v. Miller*, 76 Fed. Rep. 50. Where mineral deposit is on one end of tract and undetermined in value, sale will be ordered. *Wilson v. Regle*, 95 Tenn. 290; 32 S. W. Rep. 386. Where mineral and surface are separately allotted, owelty may be ordered to equalize the estates. *Ames v. Ames*, 160 Ill. 599; 43 N. E. Rep. 592.

that exists in the case of an ore bed, because of the nature of the property and the impossibility of ascertaining the value of the parts and on account of the impracticability of the remedy, partition of water rights would, generally, be refused; <sup>1</sup> a sale and distribution, instead, would, ordinarily, be resorted to. <sup>2</sup> But in a suit for partition of a water ditch, a mortgage upon an undivided interest in the ditch may be adjusted and an account of the water rents taken by the court. <sup>3</sup>

§ 602. **Right to, may be waived.** — Like any other legal right, even when the same is clearly recognized, partition may be waived by act of the party entitled thereto, and the right thus lost. <sup>4</sup> Although a beneficial incident to a tenancy in common, partition may be waived by agreement of the parties in interest. <sup>5</sup> And an agreement barring partition is held to establish a permanent tenancy in common; the agreement runs with the land, and partition would be refused. <sup>6</sup> But where the terms of the agreement are susceptible of such a construction, it will not be held to create a tenancy in common and bar partition forever, but only so long as the objects and purposes of the agreement are being carried out, and no longer. <sup>7</sup>

<sup>1</sup> *McGillivray v. Evans*, 11 M. M. R. 209.

<sup>2</sup> *Ante, idem.* "It is utterly impracticable for a court to make a mechanical division of water running in a ditch, and used by tenants in common for mining purposes, in such a manner as to permanently do justice between the parties." *McGillivray v. Evans*, 27 Cal. 92; M. M. D. 255.

<sup>3</sup> *Bradley v. Harkness*, 11 M. M. R. 389. "A mortgage upon an undivided interest in a ditch may be adjusted in a suit for partition of the ditch, and an account of water rates taken." *Obiter: Bradley v. Harkness*, 26 Cal. 69; M. M. D. 255.

<sup>4</sup> *Blewett v. Coleman*, 40 Pa. 45; 11 M. M. R. 160.

<sup>5</sup> *Coleman v. Coleman*, 1 Pearson, 470; 11 M. M. R. 183.

<sup>6</sup> *Coleman's Appeal*, 62 Pa. 262; 14 M. M. R. 221.

<sup>7</sup> *Coleman v. Coleman*, *supra*.

## CHAPTER XII.

### ACCOUNTING.

- SECTION 603.** Will lie against co-owners.  
604. Between partners.  
605. Against trustee.  
606. Between lessor and lessee.  
607. Against assignee of lessee.  
608. Licensor against licensee.  
609. Incident to injunction and partition.  
610. Measure of recovery.  
611. Restricted to period of limitation.  
612. Laches and estoppel may prevent.

§ 603. Will lie against co-owner. — Since no co-owner of a mine or quarry is entitled to take more than his share of the mineral produced from the common property, an action for an account can be maintained against him for any appropriation in excess of his individual interest, by his co-owner.<sup>1</sup> Where the working is entered into as a joint undertaking of the co-owners, a failure to account would render the wrong-doer liable to his cotenants for their share of the profits in the working;<sup>2</sup> but if a co-owner

<sup>1</sup> *Job v. Patton*, 20 Eq. 84; *Jacobs v. Seward*, L. R. 5 H. L. 464-478; *Denys v. Shuckburgh*, 4 Y. & C. Eq. Ex. 42; *Re Smith*, 10 Ch. 85; *Mac-Swinney Mines, etc.*, p. 111.

<sup>2</sup> *Scott v. Nesbitt*, 14 Ves. 445; *Sayers v. Whitfield*, 1 Knapp P. C. 149; *Job v. Patton*, *supra*. "For case where conversion of ore by one of several tenants in common of a mine is apparently treated as a tort, and as such not subject to consideration in a bill praying for a general accounting." *Hall v. Fisher*, 20 Barb. 442; *s. c.* 9 *Id.* 148; 1 Barb. Ch. 58; 3 *Id.* 639; M. M. D. 4. "In an action by a tenant in common of mining lands for an account of the rents and profits received by his cotenant, testimony as to the advantages which would result from mining and draining the land by machinery is not within the issues." *Gregg v. Mining Co.* (K. C. Ct. App., Dec. 1902), 70 S. W. Rep. 920.

himself take all the risks of the hazardous undertaking of developing a mine or quarry on the common property, since he could not, in such case, call upon his cotenants for any part of the losses or expenses,<sup>1</sup> they would not, ordinarily, be entitled to any part of the profits realized,<sup>2</sup> but he would only be liable for such rental or royalty as a stranger would be chargeable with under the circumstances.<sup>3</sup>

§ 604. *Between partners.* — Every partner is entitled to an account, in case of an appropriation, by any member of the firm, of more than his individual share of the firm property, produce or profits.<sup>4</sup> And in a mining partnership, unless a commercial partnership, an accounting may be had, without a dissolution.<sup>5</sup> The partnership relation

<sup>1</sup> *Kay v. Johnston*, 21 Beav. 536; *Fereday v. Wightwick*, 1 R. & N. Y. 45-50.

<sup>2</sup> *Henderson v. Eason*, 17 Q. B. 701, 721. But see *Goller v. Felt*, 80 Cal. 481, where plaintiff was held entitled to his share, less expenses of removal only.

<sup>3</sup> *MacSwiney*, p. 112, 84, 97; *McCord v. Mining Co.*, 64 Cal. 184. "Where the common property (salt works) is rented out by one tenant in common, he is accountable to his cotenants for their share of the rents he has received. And where he occupies and uses the whole property himself, he is liable to his cotenants for a reasonable rent for it in the condition it was in when he took possession." *Early v. Friend*, 16 Gratt. (Va.) 21. "When a question of title is necessarily involved upon a bill for an accounting between tenants in common, it is competent for the court to decide it." *Wilhelm's Appeal*, 79 Pa. St. 141; *Grubb's Appeal*, 79 Pa. St. 141; *M. M. D. 4*. The general grounds of equity's jurisdiction in an accounting are, the necessity for a discovery; the complicated character of the accounts, or the existence of a fiduciary relation. 1 Enc. Pl. & Pr. 98. A cotenant cannot avoid an accounting on the theory that the portion of the land that furnished the mineral taken was no more than his just share. *Cecil v. Clark* (W. Va. 1900), 38 S. E. Rep. 11.

<sup>4</sup> *MacSwiney on Mines*, p. 113; *Bentley v. Bates*, 4 Y. & C. Eq. Ex. 182; *Roberts v. Eberhardt*, *Kay*, 148; *Clegg v. Clegg*, 8 Giff. 322.

<sup>5</sup> *Bentley v. Bates*, *supra*. But see, *Nisbet v. Nash*, 11 M. M. R. 531.

being one of trust, each member is held to a strict rule of good faith and fair and open dealing.<sup>1</sup> Accordingly, property purchased with partnership funds is held in trust for the firm;<sup>2</sup> no partner should place himself in a position which will bias him against the discharge of his duty,<sup>3</sup> and for this reason, none are permitted to receive any secret profit or clandestine bonus, and if any such is received it will be held for the firm;<sup>4</sup> no partner can charge any profits to the firm<sup>5</sup> and an agreement for compensation would not be implied from the mere fact of service rendered.<sup>6</sup> Each partner is entitled to his interest in the partnership property, and for any disposition thereof, without the consent of such partner, he is entitled to an accounting from his associates.<sup>7</sup> But, on account of the fluctuating value of mines, each partner to be entitled to participate, should contribute to the joint venture.<sup>8</sup> If, when the

<sup>1</sup> *Jennings v. Rickard*, 15 M. M. R. 624; *Bank v. Bissell*, 11 *Id.* 547.

<sup>2</sup> *Settembre v. Putnam*, 11 M. M. R. 425.

<sup>3</sup> *Burton v. Mookey*, 11 M. M. R. 342.

<sup>4</sup> *Warring v. Crow*, 12 M. M. R. 280; *Fawcett v. Whitehouse*, 11 M. M. R. 250.

<sup>5</sup> *Burton v. Mookey*, *supra*.

<sup>6</sup> *Godfrey v. White*, 11 M. M. R. 562. But see *Duff v. McGuire*, 12 *Id.* 353.

<sup>7</sup> *Phillipps v. Reeder*, 11 M. M. R. 419.

<sup>8</sup> *Rhea v. Vannay*, 11 M. M. R. 318. "Where, in a proceeding for the dissolution of a partnership, the court found that there was due the complainant a certain sum over and above the amount of his expenses in the business, and the court rendered judgment for that sum in his favor against 'the said partnership:' *Held*, that the judgment was erroneous." *Levi v. Karrick*, 8 Iowa, 150; 13 *Id.* 344; M. M. D. 472. "A court may require the production of books in and of an account, but should not extend the order in such case beyond the necessities of the object in view; an order to ascertain the rental value of salt works does not justify an account of the entire operations of the concern in the manufacture of salt." *Stuart v. White*, 25 Gratt. (Va.) 300; *Mitchell v. McCall*, *Id.*; M. M. D. 4. Accounting is the sole remedy of tenants of an oil lease, who are also copartners. *Johnson v. Price*, 172 Pa. St. 427; 33 Atl. Rep.

mine is being worked at a loss, they refuse to contribute, they will not be permitted to share the profits when it has become valuable,<sup>1</sup> and an abandoned partner, operating on his own account, cannot be called upon to account by his deserting partners, when the mine has proven valuable.<sup>2</sup>

§ 605. *Against trustee.* — Perhaps one of the most frequent cases for the remedy by way of an accounting is that of beneficiary against trustee, which obtains in all the different classes of trusts. One purchasing a title, with the money of another, must account therefor;<sup>3</sup> partners, or other fiduciaries, are not permitted to make secret profits at the expense of their copartners;<sup>4</sup> proceeds of ore coming to a trustee must be accounted for,<sup>5</sup> and a trustee claiming the property or proceeds of an adventure with his beneficiary's funds is liable therefor to the rightful owner.<sup>6</sup> In these, and numerous other cases, the trustee is liable for the amount actually received by him;<sup>7</sup> but a trustee is not generally responsible for a losing venture, if without fraud

698. See, also, *Wilton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 487; 38 Atl. Rep. 110.

<sup>1</sup> *Settembre v. Putnam*, 11 M. M. R. 425.

<sup>2</sup> *Rhea v. Tothem*, 11 M. M. R. 321; *Rhea v. Varmog*, 1 *Id.* 315. In an accounting between mining partners all the members of the firm should be made parties. *Settembre v. Putnam*, 30 Cal. 490. On an accounting between partners it was held error to divide the real estate, subject to the debts outstanding; it should have been sold and the proceeds divided, after payment of the firm debts. *Moran v. McInerney*, 129 Cal. 29; 61 Pac. Rep. 575. Where a partnership agreement is contingent and not consummated, a suit for accounting and dissolution will not lie; the remedy for breach of the contract, is a suit at law. *Wachter v. Heman*, 82 Mo. App. 248.

<sup>3</sup> *Bank v. Bissell*, 11 M. M. R. 547.

<sup>4</sup> *Hirbour v. Reeding*, 11 M. M. R. 514.

<sup>5</sup> *Briggs v. Davis*, 14 M. M. R. 585.

<sup>6</sup> *Wilkinson v. Stafford*, 14 M. M. R. 522.

<sup>7</sup> *Greenwood's App.*, 14 M. M. R. 603.



or negligence<sup>1</sup> on his part, and is, unless guilty of bad faith, only answerable for ordinary care and diligence.<sup>2</sup>

§ 606. *Between lessor and lessee.*—The lessor of a mining lease has always been held entitled to maintain a suit in equity, against his lessee, for an accounting of the ore removed.<sup>3</sup> And a suit for an accounting will lie, whether an injunction would be granted to restrain the working or not,<sup>4</sup> as mining has always been considered a species of trade,<sup>5</sup> and where royalty or rent is found to be owing after the account, the court can also allow interest, if deemed equitable.<sup>6</sup> Notwithstanding annual accounting has been made by the lessee and his payments accepted by the lessor, an accounting will be decreed covering the whole period, if it can be shown the payments of royalty were incorrect or that items of ore were omitted without the lessor's knowledge,<sup>7</sup> and the lessee will be compelled to produce his books, to ascertain the correct rent or value of the mine, for the period in dispute.<sup>8</sup> But if the lessee has been evicted from the premises, he will not be made

<sup>1</sup> *Wilkinson v. Stafford*, 14 M. M. R. 522.

<sup>2</sup> *Greenwood's App.*, *supra*. "An account of the profits of coal mines cannot be decreed in favor of a party out of possession. He must bring his ejectment." *Sayer v. Pierce*, 1 Ves. 232; M. M. D. 3. "Where a bill prays an account of ore dug on complainant's lands, a court of equity will decree it in a proper case, but the complainant must show that he is in possession." *Bracken v. Preston*, 1 Pinney (Wis.), 585; M. M. D. 3.

<sup>3</sup> *Fulteney v. Warren*, 6 Ves. 73; *Jeffries v. Smith*, 1 J. & W. 302; *Parrott v. Palmer*, 3 M. & K. 632; *Jesus Coll. v. Bloome*, Amb. 55; 3 Atk. 262.

<sup>4</sup> *MacSwinney*, p. 226.

<sup>5</sup> *Ernest v. Vivian*, 33 L. J. Ch. 517; *Wright v. Pitt*, 12 Eq. 416; *Gast v. Barker*, 2 B. C. C. 61.

<sup>6</sup> *Newton v. Nack*, 43 L. T. (N. S.) 197; *MacSwinney on Mines*, p. 226.

<sup>7</sup> *Perry v. Atwood*, 8 M. M. R. 440.

<sup>8</sup> *Stuart v. White*, 5 M. M. R. 454.

to account for rent or royalty during the period of his eviction and this would be a good plea, covering the period called for by an account, the same as it would be to an action for rent for the same time.<sup>1</sup>

§ 607. **Against assignee of lessee.**—It would seem that there would be sufficient privity of estate between the lessor and an assignee of the lessee to entitle the former to bring an account,<sup>2</sup> as a working and claiming under the lease ought certainly to subject the assignee to the payment of the royalties due thereon,<sup>3</sup> or, if not, and he should be treated as a mere trespasser, he should still be held liable for an accounting,<sup>4</sup> either of the royalty,<sup>5</sup> or the full value of the ore removed.<sup>6</sup> But English cases and eminent authority exist to the effect that a lessor cannot maintain a suit for an accounting against the assignee of his lessee.<sup>7</sup>

§ 608. **Licensor against licensee.**—As in the case of a lessor, a licensor has been held entitled to the equitable remedy of an account;<sup>8</sup> his right to proceed by such rem-

<sup>1</sup> *Filley v. Meyers*, 4 M. M. R. 320; *Walker v. Tucker*, 8 M. M. R. 673, where only a partial eviction was held to be a good plea. Lessor entitled to accounting against lessee. (W. Va.) *Swearingen v. Steers*, 38 S. E. Rep. 510. Where the royalty in a lease depends upon the quantity of mineral mined, equity will compel an accounting from the lessee. *Swearingen v. Steers* (W. Va. 1901), 38 S. E. Rep. 510.

<sup>2</sup> *Watson Coal Co. v. Casteel*, 9 M. M. R. 130.

<sup>3</sup> *Wright v. Pitt*, 12 Eq. 408; *Clavering v. Westley*, 38 Wms. 402; *Great West. R. Co. v. Rans*, L. R. 4 H. L. 650.

<sup>4</sup> *MacSwinney*, p. 240.

<sup>5</sup> *Powell v. Burroughs*, 8 M. M. R. 531.

<sup>6</sup> *Jegon v. Vivian*, 8 *Id.* 628.

<sup>7</sup> *MacSwinney on Mines, Quarries and Minerals*, p. 240; *Walters v. North Coal Co.*, 5 De G., M. & G. 629; *Cox v. Bishop*, 8 De G., M. & G. 815.

<sup>8</sup> *Wright v. Pitt*, 12 Eq. 408.

edy, against the assignee of the licensee, would be similar to that occupied by the lessor and the equitable owner of a lease,<sup>1</sup> and the rights and duties of the parties, in an accounting, is analogous to that of lessor and lessee.<sup>2</sup>

§ 609. **Incident to injunction and partition.** — When a proceeding for partition of a mine, or mining land, is had in a court of equity, the court will not only proceed to divide the land, but if the equities of the parties also demand, will direct an accounting of the rents and profits, or proceeds from the ore sold.<sup>3</sup> Neither cotenant would, ordinarily, be entitled to enjoin the working by the other, as each has the right to use the estate according to its nature,<sup>4</sup> but as mining is a consumption or carrying away of the estate, the working tenant is bound to account to the others for their share of the ore removed; <sup>5</sup> and an account is frequently ordered, as incident to an injunction.<sup>6</sup>

§ 610. **Measure of recovery.** — The usual recovery by the co-owner of ore removed is held to be the value of his share of the mineral taken, less the cost of removal.<sup>7</sup> The actual working expense is ordinarily ascertained and allowed the working tenant.<sup>8</sup> And this is always true where the working was in pursuance of a contract,

<sup>1</sup> MacSwinney Mines, p. 254.

<sup>2</sup> Ex parte, Hankey, 1 Mont. & M. 247.

<sup>3</sup> Dahl v. Confidence Mining Co., 11 Mor. Min. Rep. 214.

<sup>4</sup> McCord v. Mining Co., 64 Cal. 134. "Account may be had in the case of mines, although no injunction is granted; although the contrary may be the rule in cases of timber." Parrott v. Palmer, 3 Myl. & K. 632; M. M. D. 4.

<sup>5</sup> Goller v. Fett, 30 Cal. 481; McCord v. Mining Co., 64 Cal. 134.

<sup>6</sup> Ackerman v. Hartley, 1 M. M. R. 74; Thomas v. Oakley, 7 M. M. R. 255.

<sup>7</sup> Goller v. Fett, 30 Cal. 481.

<sup>8</sup> Graham v. Pierce, 14 M. M. R. 308.

or with the consent of the plaintiff,<sup>1</sup> for in such case he is liable for his share of the cost of improvements and operating expenses.<sup>2</sup> A co-owner, however, who undertakes upon his own responsibility and at his own hazard and expense, to develop a mine or quarry, cannot, generally, be made to account for any share of the profits realized from the expenditure of his own capital,<sup>3</sup> but in such case the rental value of the mine or quarry will be treated as the proper measure of recovery.<sup>4</sup> But where the removal of the ore is the result of a fraud upon a co-owner, as where the operating tenant, in possession of a knowledge of the value of the mineral, to prevent a joint working, misrepresented the true status of the property to an absent tenant and thereby induced him to abandon the joint undertaking, while he himself made large returns, such absent co-owner is entitled to recover his share of the gross receipts of minerals without deduction for expenses, as the wrong-doer cannot take advantage of his own wrong.<sup>5</sup>

<sup>1</sup> *Job v. Patton*, 20 Eq. 97; *Henderson v. Eason*, 17 Q. B. 701; *Scott v. Nesbitt*, 14 Ves. 445; *MacSwinney*, p. 112.

<sup>2</sup> *Graham v. Pierce*, *supra*. A life tenant or cotenant who removes oil is liable on the basis of rents and profits and not for mere yearly rental. *Williamson v. Jones*, 48 W. Va. 562; 38 L. E. A. 694; 27 S. E. Rep. 411. Where the rents and profits exceed the value of improvements, one in possession, in good faith, claiming title, cannot have an accounting for expenditures and taxes paid. *Doll v. Gifford*, 18 Colo. App. 67; 56 Pac. Rep. 676. See, however, *Cheney v. Ricks*, 187 Ill. 171; 58 N. E. Rep. 234. An excluded cotenant is entitled to recover, from his cotenant, his proportion of the royalty received under a lease on the common property. *Cecil v. Clark* (W. Va. 1901), 39 S. E. Rep. 202. On accounting between cotenants, the non-operating tenant is entitled to customary royalty. *Fulmer's App.*, 128 Pa. St. 24; *Holbrook v. Harrington*, 36 Pac. Rep. 365; *Kahn v. Smelt. Co.*, 102 U. S. 641.

<sup>3</sup> *MacSwinney on Mines*, p. 112; *Henderson v. Eason*, 17 Q. B. 701.

<sup>4</sup> *Allen v. Barkley*, 14 M. M. R. 246; *Early v. Friend*, 14 M. M. R. 271.

<sup>5</sup> *Foster v. Weaver*, 15 M. M. R. 551. "In an action by one tenant in common against another the petition alleged that defendant had leased the premises to a tenant, and received the entire rent, and

§ 611. **Restricted to period of limitation.** — As equity follows the law and a court of chancery will not, usually, grant relief where the action at law would be barred by the statute of limitations, it is held that a suit for an accounting of ore extracted from a mine, will not lie, unless instituted within the statutory period of limitation, since the removal of the ore.<sup>1</sup> But the burden of proving that the action was not filed within the statutory period, after the removal of the ore, is upon the party pleading the statute,<sup>2</sup> and if there has been a fraudulent concealment of the fact of the removal, the action could be maintained, although not filed within the statutory period.<sup>3</sup>

§ 612. **Laches and estoppel may prevent.** — It is against common right to permit one to stand by and see his associates expend money, when he has the power to prevent, and afterwards charge them with his undisclosed interest, when their expenditures have not resulted to his advantage.<sup>4</sup> So, laches, for a period short of the statute

demanding an accounting. The answer alleged an agreement that defendant should conduct mining operations on the premises, and that plaintiff should be paid in full settlement a specified royalty, and that the same had been so paid and accepted. Plaintiff requested an instruction that, if defendant agreed to carry on mining and drainage operations, in consideration of which plaintiff agreed to accept less than what otherwise would have been his proportion of royalties received from tenant miners for ores mined, and defendant failed to so mine and drain the land, then plaintiff was not bound by the agreement, and could recover the full amount he would otherwise have been entitled to as a tenant in common with defendant: *Held*, that such instruction was not justified by the petition, and was properly refused." *Gregg v. Roaring Spgs. Land & Mining Co.* (Mo. Ct. App., Dec. 1902), 70 S. W. Rep. 920.

<sup>1</sup> *Dean v. Thivolt*, 1 M. M. R. 77.

<sup>2</sup> *Dean v. Thivolt*, *supra*.

<sup>3</sup> *Ante, idem*.

<sup>4</sup> *Watts' App.*, 8 M. M. R. 223; *Harlow v. Lake Superior Co.*, 8 M. M. R. 285.

of limitations, when aided by other circumstances, will effectually bar a suit for an accounting.<sup>1</sup> Laches alone will prevent an accounting between copartners;<sup>2</sup> protect cotenants from the assertion of stale claims,<sup>3</sup> and relieve a life tenant from a suit for an accounting for ore removed, before the expiration of his tenancy.<sup>4</sup> But excusable delay will always be distinguished from laches,<sup>5</sup> and if the failure to file suit can be reasonably accounted for, or if it appears that fraud or concealment has been used by the defendant, the plaintiff's action will not be barred.<sup>6</sup>

<sup>1</sup> Evans' App., 8 M. M. R. 255; Ernest v. Vivian, 8 M. M. R. 205.

<sup>2</sup> Slemmer's App., 11 M. M. R. 438.

<sup>3</sup> Phillipps v. Homfrey, 14 M. M. R. 678.

<sup>4</sup> Bagot v. Bagot, 15 M. M. R. 180.

<sup>5</sup> Stockbridge Co. v. Hudson Co., 18 M. M. R. 121.

<sup>6</sup> Warren v. Daniels, 6 M. M. R. 436. A petition in a suit for accounting that does not allege demand on defendants and refusal to account, is bad, on demurrer. Kemp v. Merrill, 92 Ill. App. 46.

## CHAPTER XIII.

### SPECIFIC PERFORMANCE OF MINING CONTRACTS.

#### SECTION 613. Will lie for sale of mine.

- 614. Exhausted mine on quarry.
- 615. Sudden appreciation of property.
- 616. Contract for lease may be enforced.
- 617. Title relates to date of contract.
- 618. Sales of mineral not enforced.
- 619. Sale of corporate stock.
- 620. As regards mining easements.
- 621. Enforcement discretionary with court.
- 622. Time of the essence of such contracts.
- 623. Fraud will excuse performance.
- 624. When mistake a defense.
- 625. Delay bars enforcement.
- 626. Waiver of performance.

§ 613. *Will lie for sale of mine.* — The action of specific performance will lie to compel compliance with a contract for the sale of a mine or quarry where the contract would be susceptible of enforcement, were the subject-matter any other character of real property.<sup>1</sup> The contract must have all the essentials of a legal, subsisting agreement and be free from ambiguity and uncertainty,<sup>2</sup> or inequality.<sup>3</sup> If contrary to the provisions of the statute of frauds,<sup>4</sup> or if the vendee had been guilty of any concealment, fraud, or misrepresentations to procure the agreement; or if unconscionable to enforce it, its perform-

<sup>1</sup> *Buckinghamshire v. Ward*, 3 Atk. 385; *MacSwinney on Mines*, p. 196; *Welland v. Huber*, 18 M. M. R. 363; *Belle Queen Mining Co. v. Tuggle*, 5 M. M. R. 464.

<sup>2</sup> *Lancaster v. DeTrafford*, 31 L. J. Ch. 554.

<sup>3</sup> *Fothergill v. Phillipps*, 6 Ch. 770.

<sup>4</sup> *Cheadle v. Proctor*, 19 L. T. (N. S.) 289.

ance would be refused.<sup>1</sup> But where the contract is otherwise capable of enforcement, the vendor cannot avoid liability, because of the failure of the vein of mineral, for the vendee is none the less entitled to the property.<sup>2</sup> Nor would a timely application for enforcement be refused, because of the fluctuation in value of the property, due to its speculative character.<sup>3</sup>

§ 614. Same — Exhausted mine or quarry. — In a contract for the sale of mining land, if the mines or quarries have been exhausted, or partly exhausted, by working; or if the title to the minerals, in place, has been severed from the title to the soil, or a right to work them granted by the owner, he cannot enforce the contract, as against the purchaser,<sup>4</sup> but the latter would be entitled to specific performance, with compensation for the ore taken.<sup>5</sup> But if

<sup>1</sup> Haywood v. Cope, 25 Beav. 140; s. c. 6 M. M. R. 499.

<sup>2</sup> Jefferys v. Fairs, 4 Ch. D. 448. "Where the vendor of a mining claim, who has entered, has paid for the claim, and obtained a certificate of purchase from the government, tenders a deed in pursuance of his contract of sale, the vendee cannot refuse the deed, and rescind the contract, merely because the vendor has not received his patent for the claim." Bash v. Cascade Min. Co., 69 Pac. Rep. 402. "If representations made in written proposals of sale of stock are true, the subsequent failure of the mine does not impair the right of the vendors to enforce the contract." Crump v. U. S. M. Co., 7 Gratt. (Virg.) 862; M. M. D. 36.

<sup>3</sup> Heywood v. Cope, 25 Beav. 140. As to when a failure to account by purchaser in possession will operate to defeat specific performance, see Clarne v. Grayson, 80 Or. 111; 46 Pac. Rep. 426. Specific performance will not be decreed where the contract provides for forfeiture of purchase money and all rights under the contract. Henry v. Mayer (Ariz.), 53 Pac. Rep. 590.

<sup>4</sup> Seaman v. Vawdrey, 16 Ves. 390; Bortan v. Downs, Fl. & K. 505; Martin v. Cotter, 8 J. & L. 496; Hayford v. Criddle, 22 Beav. 480; Ramsden v. Hurst, 27 L. J. Ch. 482.

<sup>5</sup> Pretty v. Lally, 26 Beav. 606; Mawson v. Fletcher, 6 Ch. 91; Upperton v. Nielson, 10 Eq. 228. "Upon bill for specific perform-



the consideration for the land was such that the ore deposits did not enter into the contract<sup>1</sup> if the possession of the minerals was openly in a third party,<sup>2</sup> or the vendee knew of the severance of the title,<sup>3</sup> or if he entered into possession of the tract of land purchased after knowledge of the adverse right to the ore,<sup>4</sup> he cannot subsequently insist on being compensated for the ore taken.

§ 615. **Sudden appreciation of property.**—The discovery of valuable ore deposits between the time of the contract of sale and the time for the delivery of the deed, will not excuse the vendor in refusing to perform the contract,<sup>5</sup> as increase of value is not such a change in the

ance of an agreement for the purchase of a colliery, the answer admitting the substance of the bargain and the possession of the vendee and his working the coal bed, and so destroying the estate, defendant ordered to pay installments due, before final decree or the execution of a conveyance." *Buck v. Lodge*, 8 Ves. Jr. 450; M. M. D. 834.

<sup>1</sup> *Colby v. Gadsden*, 84 Beav. 416.

<sup>2</sup> *Holmes v. Powell*, 8 De G., M. & G. 572.

<sup>3</sup> *Colby v. Gadsden*, 84 Beav. 421.

<sup>4</sup> *Smithson v. Powell*, 20 L. T. 105. "Specific performance is a matter of discretion to be exercised, however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance. Decree accordingly under this statement of the rule, for specific performance of an agreement for a coal lease, when, after prosecuting work for some time, under possession given, the coal seams were found to be 'absolutely not worth getting,' and the agreement called for a lease with £100 minimum rent, besides royalties." *Haywood v. Cope*, 25 Beav. 140; M. M. D. 834.

<sup>5</sup> *Bean v. Valle*, 18 M. M. R. 292. "Discovery of gold on premises under executory contract of sale is an accession to the value of the estate of the purchaser. It will not defeat specific performance, even after delayed payments, where the delay has been acquiesced in." *Falls v. Carpenter*, 1 Dev. & Bat. Eq. 265 (N. C.); M. M. D. 834. "A contract fair at the time when made will be specifically enforced notwithstanding unforeseen circumstances, as the sudden discovery of oil in great quantity, have immensely enhanced its value since the agreement was made." *Cady v. Gale*, 5 W. Va. 547; M. M. D. 834.

subject-matter of the contract, as to furnish a ground for its rescission. But if one of the parties refuse to perform the contract and then an appreciation of value occurs, upon the strength of which he is desirous of carrying out the agreement, its enforcement would, then, as a matter of common right, be refused him.<sup>1</sup>

§ 616. *Contract for lease may be enforced.* — A contract to grant, or take a lease of a mine or quarry, is also capable of being specifically enforced, and the party injured by the breach of such a contract is not confined to the remedy for compensation in damages.<sup>2</sup> Where the terms of the lease have not been specified, the lessor should be given the benefit of the usual clauses, for his protection, such as provisions regulating the time and mode of work,<sup>3</sup> a right to inspect and measure the quantity of ore removed,<sup>4</sup> and a right of re-entry for non-payment of rent.<sup>5</sup> Re-entry for other causes are not usual, however,<sup>6</sup> nor would a clause be inserted against assignment.<sup>7</sup> Specific performance will not lie against the lessee for breach of a covenant to work in a particular manner; the enforcement would be impracticable for the court and the lessor would be confined to an action at law,<sup>8</sup> and for the same reason a contract for a perpetual lease

<sup>1</sup> *Falls v. Carpenter*, 6 M. M. R. 398.

<sup>2</sup> *MacSwiney on Mines*, p. 196.

<sup>3</sup> *Walters v. Morgan*, 8 De G., F. & J. 722. "Specific performance of covenant to fill up a gravel pit refused, the remedy being adequate at law." *Flint v. Brandon*, 8 Ves. Jr. 159; M. M. D. 332.

<sup>4</sup> *Blakesley v. Whieldon*, 1 Ha. 176; *Lewis v. Marsh*, 8 Ha. 97.

<sup>5</sup> *Hodginson v. Crowe*, 10 Ch. 622; s. c. 19 Eq. 594.

<sup>6</sup> *Hodginson v. Crowe*, 10 Ch. 622.

<sup>7</sup> *Hodginson v. Crowe*, 19 Eq. 594.

<sup>8</sup> *Abinger v. Ashton*, 6 M. M. R. 1; *Booth v. Pollard*, 13 M. M. R. 312.

"A right of re-entry (upon a quarry), gives a complete legal remedy so as not to make specific performance a matter of course." *Rutland M. Co. v. Ripley*, 10 Wall. 339; M. M. D. 332.

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would be refused, as the cause could not remain in court forever, or the execution of such a decree be enforced.<sup>1</sup>

§ 617. **Title relates to date of contract.** — A purchaser or lessee of a mine or quarry is entitled to the property in the condition it was in at the date of the contract of sale or lease,<sup>2</sup> and if the vendor leases the mines or works them and removes ore from the land, subsequent to the date of the contract of sale, or lease, the purchaser or lessee would be entitled to recover the proceeds of the ore so taken.<sup>3</sup> But, on the other hand, if the purchaser is permitted to enter into possession pending completion of the contract, he will be held to account for the ore removed, for the pro-

<sup>1</sup> *Rutland Marble Co. v. Ripley*, 3 M. M. R. 291. A contract for an oil lease, for a nominal sum, with the right to quit work at any time and without covenants to prosecute operations, is so unjust that it will not be enforced. *Federal Oil Co. v. West. Oil Co.* (Ind. 1902), 112 Fed. Rep. 378. In Ohio it is held that lessor of oil wells can enforce the implied covenant to drill sufficient wells to protect line, the same as if lease contained such specific covenant. *Alleghany Oil Co. v. Snyder*, 106 Fed. Rep. 764. In West Virginia, damages only could be had for breach of such a covenant, expressed. *Harness v. Oil Co.*, 38 S. E. Rep. 662. No such implied covenant exists in Pennsylvania. *Young v. Forest Oil Co.*, 194 Pa. St. 248; 45 Atl. Rep. 121. Where husband and wife both sign lease as to community property, equity will decree specific performance, as against them both. *Young v. Porter*, 68 Pac. Rep. 362. See, as to specific performance of contract of married women in Missouri, *Gwin v. Smur*, 101 Mo. 550. But see *Goldstein v. Curtis* (N. J. Ch. 1902), 52 Atl. Rep. 218, where the contention that the wife could not be compelled to acknowledge the deed as her free act and will, was answered by saying that "the decree for specific performance is self-executing." In a contract for the lease of coal lands to a proposed corporation, where the parties who were to perfect the organization of the company, had an understanding that the lease was to be afterwards assigned to them, specific performance was refused, on the ground that the plaintiff did not come into court with clean hands. *Reynolds v. Boland* (Pa. 1902), 52 Atl. Rep. 19.

<sup>2</sup> *Nelson v. Bridges*, 2 Beav. 243; *MacSwinney on Mines*, p. 86.

<sup>3</sup> *Brown v. Dibbs*, 25 W. R. 776; *Nelson v. Bridges*, *supra*.

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tection of the vendor,<sup>1</sup> and if the working is shown to be such as to seriously injure or impair the security of the vendor's lien, in case of the insolvency of the purchaser, his working would be enjoined.<sup>2</sup>

§ 618. **Sales of mineral not enforced.** — A contract for the sale or purchase of minerals, after severance from the soil, will not be enforced.<sup>3</sup> After severance, minerals are in no essential different from other ordinary personal chattels and it is immaterial that the contract calls for ore of a particular description,<sup>4</sup> or from a particular mine,<sup>5</sup> for its value is, none the less, susceptible of pecuniary compensation.

§ 619. **Sale of corporate stock.** — As a general rule equity will not enforce a contract for the transfer of corporate stock where it has been placed upon the market

<sup>1</sup> *Buck v. Lodge*, 18 Ves. 450; *Dixon v. Ashley*, 1 Mer. 183.

<sup>2</sup> *Crackford v. Alexander*, 15 Ves. 138. "The purchasers of a mining property, subject to leases, were in possession of part as lessees, and a part under an agreement with the lessees, and were working and disposing of the minerals, but they had paid no rent since the time when, according to the agreement, possession was to be given. Upon motion, after answer, in a suit for specific performance by the vendors, for payment into court of the balance of the purchase-money: *Held*, that the defendants could only be required to pay into court the rent in arrear." *Robertshaw v. Bray*, 35 L. J. Ch. 844; M. M. D. 386. The mere existence of an outstanding lease will not excuse performance, although the vendor contracted to execute a clear title. *Cornell v. Rodabaugh* (Iowa, 1902), 90 N. W. Rep. 599.

<sup>3</sup> *Pollard v. Clayton*, 1 K. & J. 462; *Fothergill v. Roland*, 17 Eq. 132.

<sup>4</sup> *Fothergill v. Rowland*, *supra*.

<sup>5</sup> *Pollard v. Clayton*, *supra*. Possibly in a contract for the sale of mineral, if the vendor was insolvent, since the vendee, in such case, would not have an adequate legal remedy, specific performance might be decreed. *Waterman Spec. Per.*, Sec. 16, p. 19; *Parker v. Garrison*, 16 Ill. 250. The fact that some personal property is included in a contract, as a mere incident of the realty, will not prevent specific performance. *Young v. Porter*, 68 Pac. Rep. 862.

and has a well-known established market value, as damages in such case would furnish an adequate remedy.<sup>1</sup> But on account of the fluctuating and uncertain value of mining stock, it is frequently difficult to establish its market value, and if the stock is of a peculiar and uncertain value and competent evidence cannot be obtained to establish its real value, since the purchaser would not otherwise have a full and adequate remedy, a court of equity would decree specific performance and compel a transfer of the stock.<sup>2</sup>

§ 620. As regards mining easements. — A contract for the acquisition or disposition of a mining easement will

<sup>1</sup> *Treasurer v. Commercial Min. Co.*, 18 Mor. Min. Rep. 360.

<sup>2</sup> *Treasurer v. Commercial Min. Co.*, *supra*. "Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance. In this State courts of equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating, by competent evidence, what would be a proper measure of damages." *Treasurer v. Commercial C. M. Co.*, 28 Cal. 391; M. M. D. 336. "A valid agreement between a company and a shareholder for the cancellation of shares when the shareholder has performed his part of the contract will be specifically enforced, and the shareholder's name struck from the list of present contributors, proceedings having been commenced to wind up the company." *Marshall v. Flamorgan I. C. Co.*, L. R. 7 Eq. 129; M. M. D. 335. "To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost books, or registers of the mines, and that the defendant had refused to accept such evidence, but not alleging that the plaintiff was unable to give other evidence of his title, the defendant demurred: *Held*, that, as the plaintiff was not precluded from giving other evidence of his title, if necessary, the demurrer must be overruled." *Curling v. Flight*, 5 Hare, 244. See *s. c.* 6 *Id.* 41; 2 Phillips, 614; M. M. D. 336. The rule of impossibility of performance, excusing specific performance, was applied to a contract to issue bonds for stock which could not be performed. *Bemmel v. Coal Co.* (Pa. 1901), 18 Pa. Sup. Ct. 432.

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be specifically enforced,<sup>1</sup> if damages would not furnish complete relief for the breach,<sup>2</sup> but a contract for a mere license or privilege to mine, will not, in general, be specifically enforced.<sup>3</sup> Specific performance has been refused, however, of a contract for a way-lease to a colliery, as damages furnished an adequate remedy<sup>4</sup> and a contract for such an easement would not be held to run with the land.<sup>5</sup>

§ 621. **Enforcement discretionary with court.** — Specific performance is not a matter of right in the parties to a mining contract, but depends upon the sound discretion of the court; is granted or withheld according to the circumstances of the case, and the court must be satisfied that the contract is a fair, just and reasonable agreement, founded upon an adequate consideration, or refuse to enforce its provisions.<sup>6</sup> However, where the contract is in writing, is fair in all its parts, is sufficiently definite and certain and is based upon an adequate consideration, its enforcement is then a matter of right, on the part of the parties thereto, and it ceases to be discretionary with the court to refuse its enforcement.<sup>7</sup>

<sup>1</sup> MacSwinney on Mines, p. 197.

<sup>2</sup> *Ante*, *idem*.

<sup>3</sup> *Geiger v. Green*, 18 M. M. R. 324.

<sup>4</sup> *Anon v. White*, 3 Swanst. 108; *Ricketts v. Bell*, 1 Dr. & Sm. 335.

<sup>5</sup> *Keppell v. Bailey*, 2 M. & K. 584.

<sup>6</sup> *Geiger v. Green*, 18 M. M. R. 334.

<sup>7</sup> *North Georgia Co. v. Latimer*, 12 M. M. R. 367. A mere contract to sell an "interest in a mine" is so indefinite it cannot be enforced. *Berry v. Woodburn* (Cal.), 40 Pac. Rep. 803. *Myers v. Metzger* (N. J. Ch. 1902), 53 Atl. Rep. 374. Any provision of a contract which renders it unjust to enforce it, will justify a refusal to decree its performance. *Fed. Oil Co. v. West. Oil Co.*, 112 Fed. Rep. 373. Specific performance will not be decreed as against cotenants who contract for themselves only on condition that other tenants shall also convey, where the latter refuse. *Hector-Johnson Co. v. Billings* (Neb. 1902), 91 N. W. Rep. 183.

§ 622. **Time of the essence of such contracts.**—On account of the fluctuating value of mining property, caused not only by the rise and fall in the price of ore, but the discoveries or failures of the ore bodies as well, it is incumbent on the parties to all mining contracts, who seek enforcement of same, to proceed promptly in the assertion of their rights.<sup>1</sup> Although no time may have been agreed upon for the performance of the contract, time is generally regarded as of the essence of the agreement, and after the expiration of a reasonable time, performance would be refused.<sup>2</sup> Just what would be held a sufficient time to excuse the performance of the agreement, would necessarily differ in each case, according to the change in the character of the property or the loss or inconvenience suffered by the promisor, as a result of the delay. Three months has been held a sufficient time to enforce the execution of a contract for a lease;<sup>3</sup> the vendor is always entitled to a reasonable time to make a good title,<sup>4</sup> but where the vendee is in possession, time would not be essential to the performance of the contract, notwithstanding new and additional values, resulting from new discoveries of ore;<sup>5</sup> and

<sup>1</sup> MacSwinney on Mines, p. 194.

<sup>2</sup> McBride v. Weeks, 22 Beav. 533; Green v. Levin, 18 Ch. D. 594. "A., on the fourth of October, contracted to grant a mining lease to B., and no time was mentioned for completion. On the tenth of December, B. gave notice to A. that unless he completed the contract within a month he would rescind the contract: *Held*, on A.'s default that B. was justified in giving the notice, that the time was reasonable, and a bill by A. for specific performance was dismissed with costs, although there were matters essential for the completion which did not depend on A., but on third parties." Macbryde v. Weekes, 22 Beav. 533; M. M. D. 333.

<sup>3</sup> McBride v. Weeks, *supra*; s. c. 13 Mor. Min. Rep. 346.

<sup>4</sup> Marsh v. Holly, 14 M. M. R. 648.

<sup>5</sup> Falls v. Carpenter, 6 M. M. R. 397. Where an option to sell is extended, on the condition that the purchaser is to satisfy the vendor, before a given date, of his ability to purchase, specific performance will

what would be a reasonable time, where the facts were not disputed, would be a question of law for the court,<sup>1</sup> but otherwise a question of fact for the jury.<sup>2</sup>

§ 623. **Fraud will excuse performance.**—Fraud will excuse the performance of a contract for the sale of mining property and enable the defrauded party to set aside the contract.<sup>3</sup> This rule applies particularly to all persons occupying fiduciary relations, who acquire an advantage by concealment of the true status of the property. Accordingly, a contract under which one partner obtains an

not be decreed unless there is proof of a compliance with the condition, upon which it was extended. *Washington v. Rosarie Mining & Co.* (Tex. 1902), 67 S. W. Rep. 459. Where time is not of the essence of the contract and an objection as to title is remedied within a reasonable time, the vendor is entitled to specific performance. *Arnett v. Smith*, 88 N. W. Rep. 1037.

<sup>1</sup> *Lockhart v. Ogden*, 2 M. M. R. 602; *Morgan v. McKee*, 3 M. M. R. 129; *Leaning v. Wise*, 7 M. M. R. 41.

<sup>2</sup> *Shepler v. Scott*, 2 M. M. R. 674. "Where an interest in a mine was conveyed by deed accompanied by a contract that the purchaser might at any time within six months abandon the purchase upon making a reconveyance, but in case the contract was not so abandoned the purchaser should pay \$8,000: *Held*, that plaintiff's case was complete upon showing the contract and the lapse of time without proof of demand; 2. That if defendants claimed an extension of time, they must show the granting of such extension affirmatively; 3. That such extension being proved generally, the law would construe it to be for a reasonable time, and that what was a reasonable time was a question of law for the court." *Lockhart v. Ogden*, 80 Cal. 547; M. M. D. 376. "An indenture to secure the purchase money of mines in installments provided for the payment of £768 on every twenty-fourth day of December, until, etc.; if not paid within one calendar month, to carry interest: *Proviso*, that no suit should be brought within that month: *Held*, that the proviso controlled the covenant; that it was not a naked promise to forbear, and that a plea that suit was brought within one calendar month was good. *Foley v. Fletcher*, 3 H. & N. 769; M. M. D. 376.

<sup>3</sup> *Phosphate Co. v. Hartmont*, 5 Ch. D. 394; *Erlanger v. Sombrero Co.*, 3 App. Cas. 1218.



advantage, by reason of a failure to make disclosures, will not be enforced;<sup>1</sup> misrepresentation will defeat performance,<sup>2</sup> and so will an advantage obtained by secret mining,<sup>3</sup> or discoveries made by others than the parties to the contract.<sup>4</sup> But general statements as to the capabilities of a mine, will not enable the purchaser to avoid the contract;<sup>5</sup> the purchaser must not have the same means of information as the seller, but must be actually misled to his disadvantage;<sup>6</sup> and if he has the same means of information as the vendor, or as full an opportunity to discover the true status of the property, he cannot avoid the contract, notwithstanding exaggerations by the vendor.<sup>7</sup>

§ 624. When mistake a defense. — A contract will not be enforced that is founded upon a mutual mistake of the parties.<sup>8</sup> A mistake in description, whereby eighty acres

<sup>1</sup> *Perens v. Johnson*, 3 Sm. & G. 419.

<sup>2</sup> *Fisher v. Worrall*, 14 M. M. R. 624.

<sup>3</sup> *Phillipps v. Homfray*, 14 M. M. R. 677.

<sup>4</sup> *Coke v. Dixon*, 18 M. M. R. 357.

<sup>5</sup> *Jennings v. Broughton*, 17 Beav. 234. "The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate without disclosing the fact of which he was ignorant, that they had without authority gotten a considerable quantity of coal from under it: *Held*, that the court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an under-value." *Fothergill v. Phillips*, L. R. 6 Ch. 770; M. M. D. 334.

<sup>6</sup> *Atwood v. Small*, 6 Cl. & F. 232; *Small v. Atwood*, 3 Y. & C. Ex. Eq. 105; *Abernian Iron Works v. Wickens*, 4 Ch. 101.

<sup>7</sup> *Higgins v. Samuels*, 2 J. & H. 460; *Haywood v. Cope*, 25 Beav. 140; *Jennings v. Broughton*, 17 Beav. 234. "The plaintiff had worked the coal under his estate but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless: *Held*, that the defendant could not resist a specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable." *Haywood v. Cope*, 25 Beav. 140; M. M. D. 334.

<sup>8</sup> *MacSwinney on Mines*, p. 200.

is described, instead of eight,<sup>1</sup> a mutual mistake as to the existence of a coal vein,<sup>2</sup> or the location of an oil well upon the land demised,<sup>3</sup> or any other assumption of the parties, as to a material fact, regarding which it afterwards appears they were mutually mistaken, will authorize the court to refuse performance of the contract.<sup>4</sup> But to excuse performance the mistake must be mutual.<sup>5</sup> A mistake arising from the negligence of one of the parties to the contract is not available;<sup>6</sup> nor will mere ignorance of the facts excuse performance,<sup>7</sup> for mines are notoriously liable to faults and

<sup>1</sup> *Davis v. Shepherd*, 1 Ch. 410.

<sup>2</sup> *Harlan v. Lehigh Co.*, 8 M. M. R. 497.

<sup>3</sup> *Mays v. Dwight*, 10 M. M. R. 453.

<sup>4</sup> *Muhlenberg v. Henning*, 15 M. M. R. 473.

<sup>5</sup> *Brainard v. Arnold*, 8 M. M. R. 478. "A half interest in common in a lot descended to A., who supposed, under a mistake as to the law of descent, which was also shared by B., that the lot descended in severalty to the latter, who inherited no interest therein. Each of the parties owned adjoining lands, and thereafter they executed a joint mineral lease to several descending tracts owned by them in severalty, which included the lot in question. The lease was executed as a joint lease merely for convenience, and all the parties, including the lessee, supposed that A. had no interest in the lot in question, though they all knew the facts: *Held*, that the lease did not convey the interest of A. in such lot, since it was executed under a mutual mistake as to the ownership thereof." *Harlan v. Cent. Phos. Co.* (Tenn. 1901), 62 S. W. Rep. 614.

<sup>6</sup> *Grymes v. Landers*, 10 M. M. R. 445.

<sup>7</sup> *Haywood v. Cope*, 25 Beav. 140. "Where land was conveyed reserving ore, but it was asserted that the parties had agreed on a reservation of the ore for certain furnaces only, and that it had been otherwise written by mistake: *Held*, that a court of equity could relieve such mistake and reform the deed; but the fact not being admitted, an issue of fact was, in the discretion of the court, submitted to the jury." *Hudson Iron Co. v. Stockbridge Iron Co.*; *Stockbridge Co. v. Hudson Co.*, 102 Mass. 45; s. c. 107 Mass. 290. But such mistakes must be proved beyond a reasonable doubt. S. c. 107 Mass. 290; M. M. D. 289. "A person contracting for the lease of a mine cannot resist its performance on the ground of his ignorance of mining matters and of the mine turning out worthless." *Haywood v. Cope*, 25 Beav. 140; M. M. D. 284. "Where parties had acted upon a certain decree which was in fact

the most experienced can tell but little of the length or breadth of ore deposits in place, nor see much further in the ground than those of less experience.

§ 625. **Delay bars enforcement.** — Laches will defeat the right to an enforcement of a mining contract, as well as other rights of an equitable nature,<sup>1</sup> and a delay in applying for the enforcement of the contract is a complete defense, if of a sufficient length of time.<sup>2</sup> Three months has been held to bar the remedy; <sup>3</sup> five months; <sup>4</sup> eleven months; <sup>5</sup> two years and a half; <sup>6</sup> and three years.<sup>7</sup> But because of the varied conditions of the facts of given cases — as well as the different constitutions and temperaments of the courts — no exact time limit can be set at which such actions would be barred; each case must

void, whereby twenty feet on the Comstock lode had been set off as the several property of the plaintiff and another; and defendant had purchased such twenty feet from the plaintiff, both parties treating the decree as valid, the plaintiff having received his price, and the defendant having, by its expenditures, greatly increased the value of the property, there is no such mistake as a court of equity will correct. Equity will act upon the same hypothesis on which the parties have acted." *Kinney v. Con. Virginia M. Co.*, 4 Saw. 383; M. M. D. 239. "If a party, in making a conveyance of part of a mining claim, makes a mistake against himself as to the amount conveyed, and in another part of the same conveyance makes a mistake in his favor of a corresponding amount in another portion of the same mine, and the grantee obtains no more in the aggregate than he purchased and paid for, the equities are equal, and a court of equity will not, on the application of the grantor, reform the conveyance by correcting the mistake against him to the injury of the other party upon the entire transaction." *Kinney v. Con. Virginia M. Co.*, 4 Saw. 383; M. M. D. 239.

<sup>1</sup> *Pollard v. Clayton*, 13 M. M. R. 834.

<sup>2</sup> *Bowman v. Irons*, 18 M. M. R. 313.

<sup>3</sup> *Glasbrok v. Richardson*, 23 W. R. 51.

<sup>4</sup> *Hathorn v. Llewellyn*, 21 W. R. 570.

<sup>5</sup> *Allen v. Hilton*, 14 Ves. 58; *Pollard v. Clayton*, 1 K. & J. 462.

<sup>6</sup> *Walker v. Jeffrys*, 1 Ha. 341.

<sup>7</sup> *Eads v. Williams*, 4 De G., M. & G. 674.

necessarily depend largely upon the condition of the record in that case. Three months has been held not to bar a vendor, seeking enforcement of a contract of sale of a mine,<sup>1</sup> and seven months, under the peculiar facts of another case, was held to be no bar to the action.<sup>2</sup>

§ 626. *Waiver of performance.* — Where, under the contract, the consideration is to be paid, on the execution of the conveyance, it does not have to be sooner tendered, and a refusal to execute the conveyance would dispense with a tender of the consideration.<sup>3</sup> But a parol waiver of a written contract to convey mining property must be clear and explicit, and a refusal to accept a conveyance, because of a misunderstanding over the description of the property, would not excuse performance, or amount to a waiver of the enforcement of the contract, but the court would decree performance, notwithstanding such disagreement.<sup>4</sup>

<sup>1</sup> *Haywood v. Cope*, 25 Beav. 140.

<sup>2</sup> *Colby v. Gadsden*, 84 Beav. 416. "Bill for specific performance praying conveyance of one-seventh of the 'Iron Mountain tract,' Missouri, an account of ores, etc.; dismissed on the ground of non-performance, by complainant, laches, etc.; but without any distinction as to the law with reference to the property as a developed mine except incidentally." *Boone v. Missouri Iron Co.*, 17 How. 841; M. M. D. 334. "Bill for the specific performance of an agreement to take a lease for forty-two years, of iron and coal mines and machinery for the purpose of trade, dismissed on account of delay on the part of the lessor in making out his title and in giving possession at the time stipulated in the agreement, to the extent of defeating the benefit of the purchase." *Parker v. Frith*, 1 Sim. & Stu. 199; M. M. D. 333. For a case where laches was held to prevent enforcement, after lapse of time and increase of value of the property, see *Mahon v. Leach* (N. D. 1903), 90 N. W. Rep. 807.

<sup>3</sup> *Huffman v. Hummer*, 2 M. M. R. 242.

<sup>4</sup> *Huffman v. Hummer*, *supra*.

## CHAPTER XIV.

### RECEIVERS OF MINES.

**SECTION 627. Grounds of equity's jurisdiction.**

- 628. Of the property transferred to receiver.
- 629. Discretionary — Refused in doubtful cases.
- 630. Same — Possessory actions — Solvency of possessor.
- 631. Receivers of corporations.
- 632. When cotenant entitled to.
- 633. As between copartners.
- 634. Mortgagee may have, pending foreclosure.
- 635. At instance of mortgagor.
- 636. Defrauded purchaser, before hearing.
- 637. Delay or laches will prevent.

§ 627. Grounds of equity's jurisdiction.—On account of the fluctuating value of mining property and the fact that the operation of a mine is a removal of a portion of the *corpus* of the estate, and where the party in possession is irresponsible, those out of possession would be practically remediless, where the working is continued, courts of equity exercise a discretionary jurisdiction in the matter of application for receivers of mines, more readily than where other kinds of property are concerned.<sup>1</sup> In other species of property, since a receivership takes the property out of the possession of those interested, courts are loath to exercise their jurisdiction,<sup>2</sup> but in the case of mines, both upon

<sup>1</sup> Bar. & Adams Mines, p. 737; MacSwinney Mines, p. 111, and note; Deep River Gold Min. Co. v. Fox, 4 Ired. Eq. (N. C.) 61.

<sup>2</sup> MacSwinney, p. 111; Smith on Rec., Chap. I. "Where the property of a mining corporation organized in one State consists of real property (mines) in another State, the title to such property cannot pass to a receiver appointed in the court of a State where the property is not situate." *Simpkins v. Smith & Parmelee G. M. Co.*, 56 How. Pr. (N. Y.) 56; M. M. D. 235. The power of the court, before hearing, is limited to appointment of receiver and preservation of property; it cannot order a

grounds of public and private policy, receivers are usually preferable to an injunction or other equitable remedy that would interrupt the continuity of the mining operations.<sup>1</sup>

§ 628. **Of the property transferred to receiver.** — Pending a final decree in a proper case, a court of equity has the power to order the whole property of a mining concern or company placed in the hands of a receiver or manager,<sup>2</sup> and it is usually not necessary to first have the value of the property ascertained by a jury.<sup>3</sup> But, ordinarily, the court can only control the property subject to the jurisdiction of the court and amenable to its process.<sup>4</sup> The appointment of a receiver in one State would not affect the title to property in another State, and such property would, usually, be subject to the dominion of the owner and liable for his debts the same as though a foreign receiver had not been appointed.<sup>5</sup>

sale. *St. L. Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; 17 Enc. Pl. & Pr. 712. The property, for which receiver is asked, ought to be specifically described. *Hale-Berry Co. v. Iron Co.*, 94 Ga. 61.

<sup>1</sup> *Bar. & Adams Mines*, p. 737; *Deep River Co. v. Fox*, 1 M. M. R. 296; *Hill v. Taylor*, 12 M. M. R. 568; 22 Cal. 191; *Parker v. Parker*, 12 *Idem*, 596; *Falls v. McAfee*, 2 Ired. Law, 236; *Galloway v. Campbell*, 142 Ind. 324; *Goodale v. Dist. Ct.*, 56 Cal. 26. "Equity should be very cautious in granting injunctions to stop mining operations, because such stoppage is alike opposed to public policy and to private justice due to the party, who might ultimately be found to be the owner. The better course is not to prevent the working of the mine but to appoint a receiver." *Deep River G. M. Co. v. Fox*, 4 Ired. Eq. (N. C.) 61; M. M. D. 253.

<sup>2</sup> *Crawshay v. Maule*, 11 M. M. R. 223.

<sup>3</sup> *Whitney v. Buckman*, 10 M. M. R. 428.

<sup>4</sup> *Simpkins v. Smith Co.*, 12 M. M. R. 589.

<sup>5</sup> *Simpkins v. Smith Co.*, *supra*. In the absence of an order a receiver will generally be held to have no power to sell the property in his charge at private sale. *South Bal. Brick Co. v. Kirby*, 42 Atl. Rep. 913. But a receiver's sale is not subject to collateral attack. *Marine Phosphate Mining Co. v. Bradley*, 105 U. S. 175; *Anderson v. Chicago Title & Co.*, 101 Wis. 385; *Nat. Bank v. Neel*, 53 Ark. 110; *Warren v. Bank*, 157 N.

§ 629. Discretionary — Refused in doubtful cases. —

As the appointment of a receiver is the exercise of an auxiliary power to a proceeding in equity, such appointment is the peculiar subject of the chancellor's judicial discretion.<sup>1</sup> Before appointing a receiver and taking the property from the possession of those interested, the court should be convinced that it is a necessary remedy, and requisite to subserve the equities of the real parties in interest.<sup>2</sup> If not so convinced, on account of the stringency of the measure, the court should refuse a receiver in all doubtful cases.<sup>3</sup>

Y. 259; 17 Enc. Pl. & Pr., p. 834. Receiver can maintain suit to collect rents and profits of property. *Grant v. Buckner*, 172 U. S. 232. The court may compel the conveyance of defendant's property to receiver. *St. L. Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; but see *Amy v. Manning*, 149 Mass. 487, and 17 Enc. Pl. & Pr. 748. A receiver's possession dates from his appointment; the property is in *custodia legis* from that time and no valid levy can subsequently be made. *In re Lenox Cor.*, 167 N. Y. 623; 60 N. E. Rep. 1115. A party who consents to a receiver being a party to an action, cannot, for the first time after judgment, question the regularity of his appointment. *Pitts v. New Mammoth Gold Min. Co. (Utah, 1901)*, 65 Pac. Rep. 1076.

<sup>1</sup> *Chicago Company v. U. S. Co.*, 12 M. M. R. 571.

<sup>2</sup> *Ante, idem.* "The appointment of a receiver is a matter of sound discretion, and the court must be convinced that it is needful. It is a strong measure and cannot be exercised doubtfully." *Chicago Oil Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83; M. M. D. 308.

<sup>3</sup> *Bar. & Adams*, p. 739; *Chicago Co. v. U. S. Co.*, 12 M. M. R. 571. "The exercise of the power to appoint a receiver rests very much in the discretion of the court, exercised in view of the circumstances of the case, one circumstance being the probability of the plaintiff being ultimately entitled to a recovery, and the party asking for a receiver must first show a *prima facie* case." *Copper Hill M. Co. v. Spencer*, 25 Cal. 11; M. M. D. 308. Where, from the pleadings, or from all the facts alleged, it is doubtful if the final relief asked will be granted, the application for receiver should be refused. *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11; *Hopper v. Davies*, 70 Ill. App. 682; *Ogden v. Bear Lake Co.*, 16 Utah, 440; *Norris v. Lake*, 89 Va. 513; 17 Enc. Pl. & Pr. 743. A receivership is an ancillary remedy, to preserve property, pending litigation. *Whitman v. Buckman*, 26 Cal. 448; *Wolfe v. Clafin*, 81 Ga. 65;

§ 630. **Same—Possessory actions—Solvency of possessor.**—A court will not interfere to grant a receiver, where the parties have an adequate remedy at law, and for this reason a receiver will be refused, although an action for possession of mining property is pending, where the party in possession is solvent and able to respond in damages, and no mismanagement or other resulting injury to the property is shown.<sup>1</sup> But where it appears that the party in possession is perhaps unable to respond in damages, should his title fail, a receiver will be appointed to secure the profits to the rightful owner.<sup>2</sup>

*Greeley v. Mo. Pac. Co.*, 123 Mo. 157; *Chicago Oil Co. v. U. S. Petroleum Co.*, 57 Pa. St. 91; *St. Louis Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; 17 Enc. Pl. & Pr. 682. There must be a pending suit before a receiver will be appointed. *Davis v. Flagstaff Silver Min. Co.*, 2 Utah, 98; 17 Enc. Pl. & Pr. 684. While the allowance of receivers is discretionary, the court cannot allow more than a fair and just compensation. *Geyser Mining Co. v. Salt Lake Bank*, 16 Utah, 165; *Karn v. Rorer Iron Co.*, 86 Va. 754; *St. Paul Co. v. Diagonal Coal Co.*, 95 Iowa, 551; 17 Enc. Pl. & Pr. 878. Where a lessee's operations are enjoined he will not be entitled to a receiver merely because the injunction bond will not afford him an adequate remedy for damages. *Hickey v. Parrot Sil. & Cop. Co.* (Mont. 1901), 64 Pac. Rep. 330.

<sup>1</sup> *Carter v. Hoke*, 64 N. C. 348; *Chicago Co. v. N. S. Co.*, 57 Pa. 83; *Enterprise Co.'s App.*, 9 W. M. C. 225; *Emerson's App.*, 95 Pa. 258. "The 11 and 12 Geo. II., c. 10, does not authorize the appointment of a receiver over mines in the respondent's possession." *Frere v. Hibernian M. Co.*, 2 Hog. 80; M. M. D. 310.

<sup>2</sup> *Parker v. Parker*, 82 N. C. 165; 12 M. M. R. 596. "A receiver ought not to be appointed, in a suit involving the title of mining property, where, on account of there being no funds in his hands, it involves a stoppage of the works, in a case where there is no allegation of the insolvency of the defendants, or that the property is being injured by their mismanagement." *Carter v. Hoke*, 64 N. C. 348; M. M. D. 310. Insolvency and resulting injury to the property from that or some other cause, must, generally, be alleged. *Banner v. Dingus* (W. Va.) 33 S. E. Rep. 530; *Newton v. Rickets*, 10 Beav. 525; *Irwin v. Everson*, 95 Ala. 64; *Clark v. Johnston*, 15 W. Va. 810; 17 Enc. Pl. & Pr. 735; *Dickerson v. Bank*, 95 Iowa, 392. If defendant insolvent receiver should be appointed,



§ 631. **Receivers of corporations.** — The directors of a corporation are the trustees of its corporate property and business for the benefit of its creditors and stockholders. In the absence of mismanagement amounting to a direct impairment of the company's business and property, the affairs and property of the concern would not be taken out of the hands of the directors and, indeed, since they are the properly constituted agents to handle such property, in the absence of statute, it has been held that a court possesses no power to appoint a receiver for a mining corporation.<sup>1</sup> But where there has been fraud, deceit or mismanagement on the part of the directors, likely to impair the value of the property or affect the business of a corporation, in the exercise of its discretion, a court of equity, in a proper case, to preserve the property and subserve the interests of creditors and stockholders, will appoint a receiver and take the property out of the possession of the directors.<sup>2</sup> In contests between stock-

*Bigbee v. Summerhour*, 101 Ga. 201; 28 S. E. Rep. 642. A receiver will be appointed to protect the rights of a lessee in an ejectment suit. *Ulman v. Clark* (W. Va.), 75 Fed. Rep. 868.

<sup>1</sup> *Davis v. Flagstaff Company*, 2 Mor. Min. Rep. 661; *Neall v. Hill*, 16 Cal. 146. "A court cannot appoint a receiver or decree the winding up of the affairs of a company and sale of its property on allegations of mismanagement by its trustees, for its jurisdiction in such case is over the officers personally." *Neall v. Hill*, 16 Cal. 146; M. M. D. 810. "In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders." *Wright v. Oroville M. Co.*, 40 Cal. 20; M. M. D. 854. In absence of statute equity cannot dissolve a corporation and appoint a receiver. *Rep. Mt. Silver Mines v. Brown*, 58 Fed. Rep. 644; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah, 74; *Coquard v. Linseed Oil Co.*, 171 Ill. 480; 17 Enc. Pl & Pr. 689.

<sup>2</sup> *Deep River G. M. Co. v. Fox*, 4 Ired. Eq. (N. C.) 61; *Glover v. St. Louis Co.*, 188 Mo. 148. Evidence that a corporation owning large timber

holders alone, however, perhaps the better rule is that mere mismanagement alone will not justify a receiver at the instance of the minority stockholders, but to authorize a receiver at the request of a minority of the stockholders there must be some fraud upon the rights of the minority, or mismanagement so gross as to threaten a destruction of their interests.<sup>1</sup>

§ 632. When cotenant entitled to.—A mere dispute or disagreement between cotenants of a mine or quarry, without more, will not entitle either disputant to the appointment of a receiver, as they will be left to settle their disputes out of court.<sup>2</sup> But where there is an interference with the possession of one tenant to the extent of injuring his property rights,<sup>3</sup> or where a plain case of exclusion is established, a receiver will be appointed by the court, to preserve the common property for the injured owner.<sup>4</sup>

and coal land had executed lease to irresponsible party who was running down the value of the property, will not justify the appointment of a receiver at the instance of minority bondholders where the defendant proves the value of the property advanced after the lease and denies mismanagement or fraud. *Romare v. Broken Arrow Coal & Min. Co.*, 114 Fed. Rep. 194 (Ala. 1902). A simple contract creditor is not entitled to have the property of a firm or corporation taken from the hands of its directors or owners and placed in the hands of a receiver. *Dodge v. Manganese Co.*, 69 Ga. 665; *Barrett v. Pollak Co.*, 108 Ala. 390; *Lehigh Coal Co. v. R. B. Co.*, 43 Hun (N. Y.) 546; *Cowan v. Pa. Glass Co.*, 184 Pa. St. 1; *St. L. Coal Co. v. Edwards*, 103 Ill. 472; *Hollins v. Briarfield Coal Co.*, 150 U. S. 371; *Brown v. Lake Sup. Iron Co.*, 134 U. S. 530; 17 Enc. Pl. & Pr. 705.

<sup>1</sup> *Farwell v. Babcock* (Texas), 65 S. W. 509; *Gamble v. Water Co.*, 123 N. Y. 91; *Wheeler v. Steel Co.*, 143 Ill. 197. See also 54 Cent. Law Jour., p. 381.

<sup>2</sup> *Roberts v. Eberhardt, Kay*, 148, 159; *MacSwinney Mines*, p. 111. But see, *contra*, *Jeffries v. Smith*, 1 J. & W. 203; *Bentley v. Bates*, 4 Y. & C. Eq. Ex. 187.

<sup>3</sup> *Standford v. Ballard*, 33 Beav. 401.

<sup>4</sup> *Roberts v. Eberhardt, supra*. Although a receiver would not be ap-

And if the applicant seeks a sale, or partition of the common property, even in the absence of exclusive dominion, if one of the cotenants is in possession, a receiver will usually be appointed, on interlocutory application, to preserve the property and continue the operations of the mine or quarry, pending the sale or partition.<sup>1</sup>

§ 633. *As between copartners.* — As in the case of co-owners, who may not be jointly interested in the working of a mine, copartners will not be entitled to a receiver for any mere disagreement or difference about the working of the mine, but something more than a mere “negative want of co-operation,” must, usually, be shown.<sup>2</sup> But in an action for a dissolution and accounting of the partnership affairs, — and especially where there is also an exclusion, or interference with the partnership rights of the applicant — a receiver for the firm property, pending the final winding up of the business, will be appointed.<sup>3</sup> However, a re-

pointed to take out of the management of cotenants valuable oil lands, developed by them, it would, at the instance of the heirs of a deceased cotenant, appoint a receiver to represent them and collect their portion of the rents and profits and royalties. *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. Rep. 433.

<sup>1</sup> *Porter v. Lopes*, 7 Ch. D. 358; *Ex parte Cambrian Co.*, 14 Ch. D. 653; *Roberts v. Eberhardt*, Kay, 148. “A co-owner in a mine may be appointed the receiver by the master.” *Jeffries v. Smith*, 1 Jac. & W. 208; M. M. D. 310. “It is competent for a court of chancery, by an interlocutory order, to take possession of a mine which is the subject of litigation, pending the proceedings; but when the rights of third persons, in no manner parties to the suit, and who have purchased in good faith, have intervened, such power should not be exercised.” *Levi v. Karrick*, 13 Iowa, 344; 8 *Id.* 150; M. M. D. 308.

<sup>2</sup> *Lees v. Jones*, 3 Jur. (N. S.) 954; *Roberts v. Eberhardt*, Kay, 148; *Clegg v. Fishwick*, 1 M. & G. 294; *MacSwinney*, pp. 113, 115. “On bill to dissolve partnership, where defendant denies the partnership and is insolvent, a receiver should not be appointed.” *Wood v. Wood* (W. Va.), 40 S. E. Rep. 416.

<sup>3</sup> *Roberts v. Eberhardt*, *supra*; *Clark v. Smith*, Sel. 418; *Sheppard v.*

ceiver will not, generally, be appointed, unless the partner applying therefor seeks a final dissolution and winding up of the business, as the property will not be taken out of the hands of the firm, as a mere temporary expedient, pending a passing disagreement or misunderstanding of the members of the firm.<sup>1</sup>

Oxenford, 1 K. & J. 491; Jeffries v. Smith, 1 J. & W. 298; Lees v. Jones, *supra*. Before a receiver by partners will be appointed, it must be made to appear that the assets are liable to be depleted or injured, from mismanagement or fraud. Quinlivan v. English, 44 Mo. 46; Painter v. Painter (Cal.), 86 Pac. Rep. 865; Snyder v. Leland, 127 Mass. 291; Crawshaw v. Maule, 1 Swanst. 495; Harding v. Glover, 18 Ves. Jr. 281; 17 Enc. Pl. & Pr., p. 730. No member of a firm has a right to interfere with the possession of a receiver, after his appointment, as his possession is that of the court. Merrick v. Nat. Bank, 11 Ohio S. & Com. Pl. 293.

<sup>1</sup> Roberts v. Eberhardt, Kay, 148; MacSwinney Mines, pp. 113, 115, 116; Williams v. Rowlands, 30 Beav. 302. "A receiver may be appointed to preserve the property of a mining partnership." Sheppard v. Oxenford. See 1 Kay & J. 491; M. M. D. 308. "The expenditure made and the hazard run by defendant in opening a coal mine, considered upon application for receiver, based on a claim of partnership not made until the success of the adventure was assured, and the motion denied." Norway v. Rowe, 19 Ves. Jr. 144; M. M. D. 308. "Upon appointment of a receiver of a colliery about to be sold, the decree allowed any partner to propose himself for such office, but without salary." Wild v. Milne, 26 Beav. 504; M. M. D. 308. "Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership." Roberts v. Eberhardt, 1 Kay, 148; s. c. 23 Eng. L. & E. 245; 23 Law J. Rep. (N. S.) Ch. 201; M. M. D. 308. "Nor even in a suit to dissolve the partnership will the court appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application, it must be shown that one partner has interfered so as to prevent the business being carried on." *Id.* "If it is shown to the court that a sudden stoppage of the working of the mines would work material injury to the interest of the partners, the court may direct a continuance of the same by the receiver, until such time as the work may be advantageously stopped, or until the partners may make some

**§ 634. Mortgagee may have, pending foreclosure. —**

In a suit for the foreclosure of a mortgage upon the property of a mining company, a receiver may be obtained, in case of mismanagement or fraud, pending the final decree of foreclosure.<sup>1</sup> But to entitle the applicant to the remedy in such a case, there must usually have been a breach of the condition of the mortgage, or such acts as show a removal, disturbance or injury to the property, preceding the maturity of the debt.<sup>2</sup>

**§ 635. At instance of mortgagor. —** A mortgagor may have a receiver where the mortgagee is in possession and is guilty of mismanagement or fraud, to the injury of the mortgagor's rights.<sup>3</sup> And in a suit to redeem, the mortgagee will be charged with all proceeds of ore received and credited by proper outlays and the profits applied on the

arrangement for the sale or disposition of their interests which will allow a continuation of said work." *Levi v. Karrick*, 8 Iowa, 155; s. c. 13 *Id.* 344; *M. M. D.* 308.

<sup>1</sup> *Peek v. Triunsmoran Co.*, 2 Ch. D. 115. "The purchaser at judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by statute for redemption." *Hill v. Taylor*, 22 Cal. 191. "The complaint stated that at a foreclosure sale plaintiff purchased an undivided one-third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed, and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *Held*, that on the facts stated, plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous." *Id.*, *M. M. D.* 309.

<sup>2</sup> *Huntington v. Coal Assn.*, Set. 421; *Lloyd v. Lloyd Co.*, Set. 189; *MacSwinney*, p. 210.

<sup>3</sup> *Rowe v. Wood*, 2 J. & W. 555.

mortgage debt.<sup>1</sup> But before payment of the debt a receiver will not be appointed, unless there has been fraud or mismanagement, and the mere fact that more outlays might have brought about better results, will not justify a receiver, as against a mortgagee in possession.<sup>2</sup>

§ 636. — **Defrauded purchaser, before hearing.** — Where a purchaser has entered into possession of a mine or quarry and then sues to rescind the sale, on account of fraud on the part of the vendor, if it cannot be worked at a profit and it is necessary to keep the operations going in order to prevent a forfeiture, or drowning of the mine, a receiver for the property will, generally, be appointed, on the filing of the suit, pending the final hearing of the cause.<sup>3</sup> But, in such case, it would be necessary for the plaintiff to furnish the means to keep the concern going, until the final hearing, or, otherwise, a receiver would not be appointed.<sup>4</sup>

§ 637. **Delay or laches will prevent.** — Where a receiver or manager for a mine or quarry is desired, on account of the necessary hazard attendant upon mining operations, and the extremely fluctuating value of the property, the application should be made with all reasonable promptness.<sup>5</sup> Where the party applying for a receiver has neglected to do so until the mine has proven valuable, or where it has changed from an unprofitable to a paying concern, the application generally will be denied.<sup>6</sup>

<sup>1</sup> *Tipton Green Col. Co. v. Tipton Moor. Col. Co.*, 7 Ch. D. 192.

<sup>2</sup> *Rowe v. Wood*, 2 J. & W. 555.

<sup>3</sup> *Gibbs v. David*, 20 Eq. 373; *MacSwinney*, p. 201.

<sup>4</sup> *Ante, idem.*

<sup>5</sup> *MacSwinney on Mines*, p. 117.

<sup>6</sup> *Shepard v. Oxendorf*, 1 K. & J. 497.

## CHAPTER XV.

### SUITS TO QUIET TITLE.

**SECTION 638. Equity's jurisdiction of such cases.**

639. What title will support action.

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§ 638. **Equity's jurisdiction of such cases.** — Modern suits to quiet title, or to remove cloud — which will be treated as interchangeable terms<sup>1</sup> — are but the outgrowth of the ancient *quia timet* doctrine of the English court of chancery, one of the original grounds of equity's jurisdiction.<sup>2</sup> As the chancery court was originated but to furnish remedies in cases where the common law was inadequate to afford complete relief, this, like other equitable remedies, will be withheld, in cases where there is a complete, or adequate, legal action.<sup>3</sup> Like all other actions in equity,

<sup>1</sup> Some authorities distinguish suits to quiet title from actions to remove cloud. *Huntington v. Allen*, 44 Miss. 662; 17 Enc. Pl. & Pr. 279. But the distinction is not of great practical importance.

<sup>2</sup> *Bispham's Br. Eq.*, Sec. 438; *Pom. Eq. Jur.*, Sec. 1394; *Story's Eq.*, Sec. 826; *Huntington v. Allen*, 44 Miss. 662; *Loring v. Hildreath*, 170 Mass. 328; *Logan v. Clough*, 2 Colo. 328; 17 Enc. Pl. & Pr. 281; *Kennedy v. Kennedy*, 7 Wright, 417.

<sup>3</sup> *Lyon v. Alley*, 130 U. S. 177; *Fontaine v. Hudson*, 93 Mo. 62; *Bullion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah, 3; *Davis v. Settle*,

the jurisdiction of the court is over the person of the defendant,<sup>1</sup> except where the proceeding is enlarged by statute to cases of constructive service, for then the action, in its very nature, is one only *in rem*.<sup>2</sup>

§ 639. What title will support action. — The plaintiff must have some legal or equitable title or interest in the property to maintain the suit, for he cannot recover alone upon the want of title in the defendant,<sup>3</sup> but just what estate he must show to support the action, depends largely upon the defendant's title, as he is required to show a claim superior to the defendant's, to recover.<sup>4</sup> It is not necessary, however, that a party own the fee, to maintain the action; <sup>5</sup> a *prima facie* case is made, when a title superior to the defendants is established,<sup>6</sup> and, where there is no better right shown, possession alone will justify the court to grant the proper relief.<sup>7</sup> Originally the action could only

43 W. Va. 17; *Abony Mining Co. v. Auditor-Gen.*, 37 Mich. 391; *Graham v. Pancoast*, 6 Casey, 89; *Steward's App.*, 78 Pa. St. 88; 12 Mor. Min. Rep. 491.

<sup>1</sup> *Hart v. Samson*, 110 U. S. 151; *Remer v. Mackay*, 35 Fed. Rep. 86; *Dillon v. Heller*, 39 Kan. 599. But see, *contra*, *Otis v. DeBaer*, 116 Ind. 531; *Prentice v. Duluth Co.*, 58 Fed. Rep. 437; 17 Enc. Pl. & Pr. 294.

<sup>2</sup> *Dillon v. Heller*, 39 Kan. 599.

<sup>3</sup> *Dick v. Foraker*, 155 U. S. 414; *Whipple v. Gibson*, 158 Ill. 339; *Jackson v. Kettle*, 34 W. Va. 207; *Stanton v. Catron*, 8 N. M. 355; *Rutherford v. Ullman*, 42 Mo. 216; *Hall v. Melvin*, 62 Ark. 439; *Head v. Fordyce et al.*, 17 Cal. 149; 12 Mor. Min. Rep. 470.

<sup>4</sup> *Dick v. Foraker*, *supra*; *Raynor v. Lee*, 20 Mich. 384; *Kilts v. Austin*, 83 Cal. 167; 17 Enc. Pl. & Pr., p. 301.

<sup>5</sup> *Peirce v. Felter*, 53 Cal. 18.

<sup>6</sup> *Loomis v. Roberts*, 57 Mich. 284; 17 Enc. Pl. & Pr. 301.

<sup>7</sup> *Gage v. Schmidt*, 104 Ill. 106; *Horn v. Jones*, 28 Cal. 194; *Pralus v. Pac. Gold & Silver Mining Co.*, 35 Cal. 30; 12 Mor. Min. Rep. 478. Action will lie, where extrinsic evidence is necessary to impeach a patent from the United States. *Morris v. U. S.*, 174 U. S. 196; 43 L. Ed. 947; *Davenport v. Stephens*, 95 Wis. 456; *Ogden v. Armstrong*, 168 U. S. 224; *Rich v. Broxton*, 158 U. S. 375; *Cunningham v. Brown*, 39 W. Va. 538.



be maintained, by a party who held the legal title,<sup>1</sup> and such is still the general rule, in the Federal courts;<sup>2</sup> but although the holder of only an equitable title should first be held to enforce the trust and acquire the legal title,<sup>3</sup> statutory innovations and constructions have now quite generally extended the remedy to the holder of an equitable title too.<sup>4</sup> One claiming by adverse possession only is held entitled to maintain the action.<sup>5</sup> And one who has parted with his title, has been said to have an interest sufficient to enable him to sue, provided he had executed covenants of warranty, in his sale of the property.<sup>6</sup>

"In an action under St. 1889, Ch. 442, the court cannot consider or determine prescriptive rights of parties to land or easements, but only such rights as appear of record." *Crocker v. Cotting* (Mass.), 63 N. E. Rep. 402.

<sup>1</sup> *Parley's Park Silver Min. Co. v. Kerr*, 180 U. S. 256; *Bordon v. Land & Co.*, 157 U. S. 330; *Sulleff v. Smith*, 58 Kan. 560; 17 Enc. Pl. & Pr. 303.

<sup>2</sup> *Parley's Park Silver Mining Co. v. Kerr*, 180 U. S. 256; *Frost v. Spitley*, 121 U. S. 314. But see *Van Wyck v. Knevois*, 106 U. S. 370; *So. Pac. Co. v. Stanly*, 49 Fed. Rep. 265; cited 17 Enc. Pl. & Pr. 303.

<sup>3</sup> *Harrigan v. Mowry*, 84 Cal. 456; *Bryan v. Tormeg*, 84 Cal. 126.

<sup>4</sup> *Mason v. Black*, 87 Mo. 329; *Morris v. Bank*, 17 Colo. 231; *Jackson v. Tatebo*, 3 Wash. 456; *Neal v. Allen*, 55 Kan. 638; *Hayford v. Wallace* (Cal.), 46 Pac. Rep. 298; 17 Enc. Pl. & Pr. 304.

<sup>5</sup> *McRea v. Gardner*, 181 Mo. 599; *Horns v. Krantz*, 167 Ill. 421; *Clemmons v. Cox*, 116 Ala. 567; 420 Mining Co. v. Bullion Mining Co., 3 Sawy. U. S. 634.

<sup>6</sup> *Jackson v. Kittle*, 85 W. Va. 207; *Remer v. Mackay*, 35 Fed. Rep. 86; *Begale v. Hersheg*, 86 Mich. 180; *Oberlon Land Co. v. Dunn*, 56 N. J. Eq. 749. But see *Heney v. Pesolt*, 107 Cal. 58; *Glas v. Goodrich*, 175 Ill. 20; 17 Enc. Pl. & Pr. 302. Lossees, mortgagees, trustees, assignees, lienholders, attaching creditors, cotenants, reversloners, remaindermen, executors and administrators, execution purchasers, and many others are enumerated as competent to sue in 17 Enc. Pl. & Pr. 298. Where the plaintiff's title is that of execution purchaser of a mining claim and the petition does not show that the judgment debtor had title to the claim, the suit should be dismissed. *Hardware Co. v. Frank*, (Mont. 1901), 65 Pac. Rep. 1.

§ 640. Same—Title to minerals after severance. —

Where there has been a severance of the title to the mineral in place, from that to the surface of the land, the owner of the mineral title can maintain a suit to quiet title as against a subsequent grantee or surface owner who asserts an adverse claim and title to the mineral beneath the surface.<sup>1</sup> And the case of mines or mineral titles furnishes an apparent exception to the rule that such remedy will not be granted where the adverse claim is void upon its face, for, as to a mine, or mineral title, an adverse claim will be canceled, although void upon its face.<sup>2</sup> But because of the conditional nature of the property in oil and gas, in place, the legal title not becoming vested in the grantee under his deed, or lease, until a discovery and reduction of the mineral to his possession,<sup>3</sup> it is doubtful if the grantee of oil or gas would have such a title, distinct from that of the surface owner, as to enable him to maintain a suit to quiet title as to such property, before it is reduced to possession, or, at least discovered, and as the property in the mineral would then be personalty, it is doubtful if the action could then be maintained.<sup>4</sup>

§ 641. By and against whom maintainable. — One tenant in common can maintain a suit to quiet title to a mining claim upon the public land of the United States, where his cotenant is asserting an adverse title to such

<sup>1</sup> *Tenney v. Hatch*, 19 Ky. L. Rep. 753; 41 S. W. Rep. 559. "Where there has been a severance of the mineral title from that of the surface, and a subsequent grantee of the surface claims title, under a deed, to the mineral, an action will lie by the mineral owner, to quiet title to his property." *Tenney v. Hatch*, 19 Ky. L. Rep. 753; 41 S. W. Rep. 559.

<sup>2</sup> *Alleghany Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638.

<sup>3</sup> *Lawson v. Kirchner*, 50 W. Va. 344; 40 S. E. Rep. 344 (1902).

<sup>4</sup> *Ante, idem.* And see section entitled "*Nature of property in oil and gas.*"

claim, which he has purchased.<sup>1</sup> A possessor of a ditch upon government land has been held entitled to the remedy against a judgment lien claimant;<sup>2</sup> heirs,<sup>3</sup> or executors and administrators;<sup>4</sup> the holder of a legal<sup>5</sup> or equitable title;<sup>6</sup> the purchaser of a tax title;<sup>7</sup> a mortgagee,<sup>8</sup> assignee<sup>9</sup> or trustee<sup>10</sup> have been held capable of suing,<sup>11</sup> and generally anyone holding a title or interest in real estate can bring the action.<sup>12</sup> It is proper to make anyone a defendant, who is interested in the property, adversely to the plaintiff;<sup>13</sup> and any one claiming a legal or equitable title or interest can be made a defendant,<sup>14</sup> including infants,<sup>15</sup> dower claimants,<sup>16</sup> heirs,<sup>17</sup> executors and administrators;<sup>18</sup> and it is even held that persons yet unborn, or con-

<sup>1</sup> *Nesbitt v. De Lamars Nev. Gold. Min. Co.*, 58 Pac. Rep. 178; *Ross v. Helntzey*, 86 Cal. 313; 12 Mor. Min. Rep. 483; citing *Leary v. Duff*, 137 Mass. 147. And cotenants may, but need not, join as plaintiffs. *Rogers v. Turpin*, 105 Iowa, 183; 17 Enc. Pl. & Pr. 319.

<sup>2</sup> *Head v. Fordyce*, 17 Cal. 149; 12 Mor. Min. Rep. 470. But see, *contra*, *Eldridge v. Kuehl*, 27 Iowa, 176. But see *Blair v. Hemphill*, (1900), 82 N. W. 501.

<sup>3</sup> *Jordan v. Fay*, 98 Colo. 264.

<sup>4</sup> *Thorp v. Sampson*, 84 Fed. Rep. 65.

<sup>5</sup> *Wehnman v. Conklin*, 155 U. S. 314.

<sup>6</sup> *Wall v. Magnus*, 17 Cal. 476.

<sup>7</sup> *Walker v. Converse*, 148 Ill. 622.

<sup>8</sup> *Love v. Bryson*, 57 Ark. 589.

<sup>9</sup> *Byles v. Rowe*, 64 Mich. 522.

<sup>10</sup> *Fatjo v. Swasey*, 111 Cal. 628; *Ambler v. Leach*, 15 W. Va. 677.

<sup>11</sup> 17 Enc. Pl. & Pr. 298.

<sup>12</sup> 17 Enc. Pl. & Pr. 301. Defendant cannot complain that only one cotenant is a party and has no interest in a portion of the property where he has none in any portion thereof. *Nesbitt v. Gold Min. Co.* (Nev.), 53 Pac. Rep. 609.

<sup>13</sup> *Thompson v. McCorkle*, 136 Ind. 484; 17 Enc. Pl. & Pr. 320.

<sup>14</sup> *Bulwer Con. Min. Co. v. Standard Co.*, 83 Cal. 589.

<sup>15</sup> *Bailey v. Briggs*, 56 N. Y. 407.

<sup>16</sup> *Linden v. Doltch*, 40 Hun (N. Y.), 239.

<sup>17</sup> *Jordan v. Fay*, 98 Cal. 264.

<sup>18</sup> *Thorp v. Sampson*, 84 Fed. Rep. 65.

tingently interested, are bound by a decree, when they have been properly represented and protected.<sup>1</sup> But it is always necessary that the defendant should have an adverse claim or interest to that of the plaintiff;<sup>2</sup> and because the adverse claim is wanting in such cases, it has been held impossible for an heir to maintain the suit against the "unknown heirs" of his ancestor,<sup>3</sup> for an heir to sue the administrator of his ancestor, as to a title of such ancestor,<sup>4</sup> or for a landlord to sue his tenant, during the term, as to an adverse title purchased by the tenant,<sup>5</sup> for the reason that in all these cases there could be no adverse claim to the plaintiff, or if there was, the claimant would be estopped from asserting it.

§ 642. *Same — Between lessor and lessee.* — While a lessor cannot maintain a suit against his lessee, during the term, to quiet a title that the lessee may have purchased,<sup>6</sup>

<sup>1</sup> *Loring v. Hildreath*, 170 Mass. 328. And see, generally, this title, 17 Enc. Pl. & Pr. 322.

<sup>2</sup> *Ante, idem.*

<sup>3</sup> *Cashman v. Cashman*, 128 Mo. 647.

<sup>4</sup> *Jordan v. Fay*, 98 Cal. 264; *Tyroon v. Hunton*, 67 Cal. 325.

<sup>5</sup> *Van Winkle v. Hinkle*, 21 Cal. 342; 17 Enc. Pl. & Pr. 322. But see *Stewart's App.*, 78 Pa. St. 88; 12 Mor. Min. Rep. 491. In a suit to quiet the title to a mining claim it is not necessary to allege the citizenship of the plaintiff, notwithstanding certain aliens are prohibited the benefit of the laws of Idaho (Sess. Laws 1899, p. 70). *Buckley v. Fox* (1902), 67 Pac. Rep. 659. A judgment debtor can bring a suit to quiet title against a purchaser of his mining claim, at execution sale, after receiving notice from such purchaser to quit and surrender possession to her. *Lovelady v. Burgess*, 33 Oregon, 418; 53 Pac. Rep. 25. But under the Missouri statute (R. S. Mo. 1899, § 1025), a foreign mining corporation that has not filed a copy of its charter or articles in the State Secretary's office and complied with the statute cannot maintain a suit in the State to quiet the title to land there situated. *Dunnaway v. Day* (1901), 163 Mo. 415. But leasing land, by a mining corporation, is not "doing business" in Missouri. *Coal & Mining Co. v. Ladd*, 160 Mo. 485.

<sup>6</sup> *Van Winkle v. Hinkle*, 21 Cal. 342; *Lile v. Rollins*, 25 Cal. 438.

since such title could not be asserted against the lessor, yet if the lessee should quit and abandon his lease, after it had been placed of record, the lessor could then maintain a suit to have the same canceled, as a cloud upon his title, as he would have no other adequate remedy at law.<sup>1</sup> And the action will also lie against the assignee of the original lessee,<sup>2</sup> where there has been an abandonment of the lease, or by a lessee against a subsequent lessee, claiming under a second lease from the same lessor;<sup>3</sup> and upon a recovery and cancellation of the lease by the lessor or landowner, the lessee would not be entitled to compensation or reimbursement for expenses or developments made while he was conducting mining operations under the lease.<sup>4</sup> But forfeitures are regarded with such odium in equity, that it will never lend its aid to enforce the terms of a contract working a forfeiture,<sup>5</sup> and where the only basis of the lessor's cause of action is a forfeiture of his rights by the lessee, relief would be refused by the chancellor;<sup>6</sup> the lessor would be confined to his action of ejectment and upon the issue of the forfeiture the lessee would be entitled to a jury trial.<sup>7</sup>

<sup>1</sup> *Crawford v. Ritchey*, 48 W. Va. 252; 27 S. E. Rep. 220. Under a twenty-year oil and gas lease, a failure to bore a test well for seven years was held such conclusive evidence of abandonment by the lessee as to justify the cancellation of the lease as a cloud on lessor's title. *Crawford v. Ritchey*, *supra*.

<sup>2</sup> *Allen v. Indiana Oil & C. Co.* (Ind. 1901), 60 N. E. Rep. 1003.

<sup>3</sup> *Elk Fork Oil & Gas Co. v. Jennings* (W. Va.), 84 Fed. Rep. 839.

<sup>4</sup> *Detlor v. Holland*, 57 Ohio St. 429; 49 N. E. Rep. 690; 40 L. R. A. 266, where the expense of drilling wells for oil and gas was held to fall upon lessee, by reason of his abandonment. *Idem*.

<sup>5</sup> *Livingston v. Tompkins*, 4 Johns. Ch. 415.

<sup>6</sup> *Messersmith v. Messersmith*, 22 Mo. 369; *Livingston v. Tompkins*, 4 Johns. Ch. 415.

<sup>7</sup> *Ante, idem*. *Stewart's App.*, 78 Pa. St. 88; 12 M. M. R. 491; *Buck v. Justice Min. Co.*, 58 Fed. Rep. 827; *La Cross v. Wadsworth* 56 Mich.

§ 643. **The adverse claim or title.**—The Supreme Court of Massachusetts has held any claim or title “which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost,” a proper subject for relief by bill to quiet title.<sup>1</sup> Generally any description of claim, or assertion of title, against the legal or equitable owner or possessor of real estate, likely to result in litigation or loss to him, is a proper subject for relief by such a remedy.<sup>2</sup> And if the existence of such an interest is a cloud upon the title of the plaintiff, the court will grant him relief, although such adverse claim may not have been actually asserted by the defendant, prior to the institution of the suit.<sup>3</sup> But the claim or title of the defendant must, in every case, be adverse to that of the plaintiff.<sup>4</sup> The owner of the fee can quiet a claim affecting either an estate for years,<sup>5</sup> or the remainder,<sup>6</sup> for such claims are adverse to his claim and title; but a tenant for life, or years, could not quiet a

421. But it has been held that a suit will lie to cancel a forfeited lease, as a cloud upon the plaintiff's title. *Nickerson v. Canton Marble Co.*, 35 N. Y. App. Div. 111; 54 N. Y. Supp. 705.

<sup>1</sup> *Martin v. Graves*, 5 Allen, 601; cited and approved in *Stewart's App.*, 78 Pa. St. 88; 12 Mor. Min. Rep. 491; *Brainerd v. Arnold*, 8 Mor. Min. Rep. 478; *Chaffee v. Detroit*, 58 Mich. 573.

<sup>2</sup> *Head v. Fordyce*, 17 Cal. 149; 12 Mor. Min. Rep. 470; *Pralus v. Pac. Gold & Sil. Min. Co.*, 35 Cal. 30; 12 M. M. R. 478; *Stewart's App.*, *supra*.

<sup>3</sup> *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 88 Cal. 589; *Cook v. Frichey*, 61 Miss. 1. A mere verbal claim, or assertion of ownership by defendant, will not justify an action to remove a cloud from the plaintiff's title. *Waters v. Lewis*, 106 Ga. 758; 32 S. E. Rep. 854. *Sulphur Mines Co. v. Boswell*, 94 Va. 480; 27 S. E. Rep. 24.

<sup>4</sup> *Stewart v. Hick*, 34 Ohio St. 420; *Onderdonk v. Mott*, 34 Barb. (N. Y.) 106; 17 Enc. Pl. & Pr. 321.

<sup>5</sup> *Stewart's App.*, 78 Pa. St. 88; 12 Mor. Min. Rep. 491; *Brainerd v. Arnold*, 8 M. M. R. 478.

<sup>6</sup> *Kellar v. Stanley*, 86 Ky. 240; *Holmes v. Winter*, 47 Fed. Rep. 257.

claim to the remainder, for as to such claims he has no adverse interest.<sup>1</sup>

§ 644. **When plaintiff must be in possession.** — Where the plaintiff holds the legal title, or one which would enable him to recover possession in the legal action of ejectment, he is not permitted to maintain a suit to quiet his title, unless in possession, for he has an adequate remedy at law.<sup>2</sup> When in possession, however, he would not have an adequate legal remedy to test his title, and hence could maintain the action.<sup>3</sup> And where he does not hold a title sufficient to enable him to recover in ejectment, he can sue to remove a cloud from his title, although not in possession, as he would also be without an adequate legal remedy.<sup>4</sup> The court will, therefore, assume jurisdiction, where the plain-

<sup>1</sup> *Onderdonk v. Mott*, 84 Barb. (N. Y.) 106; 17 Enc. Pl. & Pr. 321. See, also, *Cashman & Cashman*, 123 Mo. 647. The action can be maintained against a party claiming a lien upon the property. *Head v. Fordyce*, 17 Cal. 149; 12 Mor. Min. Rep. 470. But see, *contra*, Iowa Code, 1897, Sec. 4223. *Fejervong v. Longer*, 9 Iowa, 159; *Eldridge v. Kuehl*, 27 Iowa, 176; 17 Enc. Pl. & Pr. 321. But see *Blair v. Hemphill* (Iowa, 1900), 82 N. W. 501. An option to purchase, after placed of record, if sufficient cause exists, can be canceled as a cloud on title. *Reilly v. Tygard*, 28 Pitts. L. J. (N. S.) 313.

<sup>2</sup> *Elk Fork Oil Co. v. Jennings*, 84 Fed. Rep. 839; *Robertson v. Wheeler*, 162 Ill. 566; *Weaver v. Bates* (Ky.), 33 S. W. Rep. 1118; *Kelly v. Martin*, 107 Ala. 479; 17 Enc. Pl. & Pr. 305; *Bedford v. Sykes*, 67 S. W. Rep. 569.

<sup>3</sup> *Mason v. Black*, 87 Mo. 329; *McRea v. Gardner*, 131 Mo. 599; *Rutz v. Kohn*, 143 Ill., 558; *Sutcliff v. Smith*, 58 Kan. 560; *Brown v. Boquils*, 57 Ark. 97; *Wakefield v. Sunday Lake Mining Co.*, 85 Mich. 605; *Packard v. Beaver V. & L. Co.*, 96 Ky. 249; *Scorpion Sil. Min. Co. v. Morsano*, 10 Nev. 370; *Lovelady v. Burgess*, 32 Oregon, 418; *Virginia Coal Co. v. Kelly*, 93 Va. 332; *Burns v. Mearns*, 44 West Va. 744; 17 Enc. Pl. & Pr. 308. In West Virginia, it is held plaintiff must be in possession. *Virginia & Iron Coal Co. v. Kelly*, 93 Va. 332.

<sup>4</sup> *Mason v. Black*, 87 Mo. 329; *Kerr v. Martin*, 90 Ky. 377; *Holden v. Holden*, 24 Ill. App. 106; *Conn. Ins. Co. v. Smith*, 117 Mo. 261; *Smith v. Orton*, 21 How. (U. S.) 241; 17 Enc. Pl. & Pr. 311.

tiff is not in possession, if he has but an equitable title,<sup>1</sup> or one depending upon oral evidence,<sup>2</sup> for in such case an adequate legal remedy would be impossible.<sup>3</sup> In these cases, or where, from any cause, there is some independent ground for equitable interference, the action would lie, although the plaintiff was not in possession,<sup>4</sup> and once jurisdiction attached, the court would grant complete relief and restore the successful plaintiff to possession.<sup>5</sup>

§ 645. **Possession alone of mining claim sufficient.** — Mere possession has been held sufficient to maintain a suit to quiet title to a mining claim upon the land of the United States,<sup>6</sup> for a possessory title, as to all except the government, is a good estate in real property, although held on condition, which is subject to conveyance and the laws of descent, the same as other real property.<sup>7</sup> It is even held, under the Nevada practice act, that the action can be maintained by one in possession, whether the possession be rightful or wrongful, and that the question of how the possession was acquired cannot be inquired

<sup>1</sup> *Mason v. Black*, *supra*; *Branch v. Mitchell*, 24 Ark. 481; *Brown v. Wilson*, 21 Colo. 309. But see *Frost v. Spitley*, 121 U. S. 556.

<sup>2</sup> *Mason v. Black*, *supra*; *Echols v. Hubbard*, 90 Ala. 309.

<sup>3</sup> *Tuffree v. Polhemus*, 108 Cal. 670; 17 Enc. Pl. & Pr. 304; *Morris v. Bank*, 17 Colo. 281.

<sup>4</sup> *Gilbreath v. Dillday*, 152 Ill. 207; *Branch v. Mitchell*, 24 Ark. 439; *Sharon v. Tucker*, 144 U. S. 533; *Corberry v. West Va. Co.*, 44 W. Va. 260. Statutes have been passed in many States dispensing with the necessity of possession, on the part of the plaintiff.

<sup>5</sup> *Graves v. Ewart*, 99 Mo. 18; *Conn. Ins. Co. v. Smith*, 117 Mo. 261; *Branch v. Mitchell*, 24 Ark. 439; *Trainor v. Greenough*, 145 Ill. 543; *Gore v. Dickinson*, 98 Ala. 363; 17 Enc. Pl. & Pr., pp. 310, 311.

<sup>6</sup> *Pralus v. Pac. Gold & Sil. Min. Co.*, 35 Cal. 30; 12 Mor. Min. Rep. 478.

<sup>7</sup> *Harris v. Equator Min. Co.*, 8 McCreary (U. S.), 14; 12 Mor. Min. Rep. 178; *Honixhurst v. Louder*, 28 Cal. 331; 12 M. M. R. 214; *Lentz v. Victor*, 17 Cal. 271; 12 M. M. R. 211.



into.<sup>1</sup> This is an extreme doctrine, however, which might permit one occupying a wrongful position to profit by his own wrong in an equitable proceeding, and the better doctrine would seem to be that the possession, sufficient to maintain the action, must be a rightful possession,<sup>2</sup> and that a petition which fails to show a rightful possession in the plaintiff is subject to demurrer.<sup>3</sup>

§ 646. **Same — Ditch and water rights.** — Any claim to real estate, or interests therein, which might result in loss or litigation to the owner or party in possession, is held to be the subject of a suit to quiet title. Accordingly, a bill will lie to quiet the title of the possessor of a ditch, for drainage purposes, upon a mining claim,<sup>4</sup> and, likewise, the remedy will be extended to the protection of a water right, to which an adverse claim is made,<sup>5</sup> but, in either case, possession of the property, in which the right is claimed, is essential to the maintenance of the action.<sup>6</sup>

<sup>1</sup> *Scorpion Silver Min. Co. v. Morsano*, 10 Nev. 370; 12 M. M. R. 502; overruling *Blasdel v. Williams*, 9 Nev. 161. Where plaintiff had been in possession several years a defense that a prior location of the mining claim was never abandoned cannot be urged by defendant unless he claims under such prior claimant. *Ramus v. Humphreys*, 133 Cal. 340; 65 Pac. Rep. 875.

<sup>2</sup> *Pralus v. Jefferson Gold and Silver Mining Co.*, 34 Cal. 558; 12 Mor. Min. Rep. 473; *Kitts v. Austin*, 83 Cal. 167; *Wood v. R. R.*, 11 Kan. 323; *Frost v. Spitley*, 121 U. S. 556; *Walker v. Pogue*, 2 Colo. App. 152.

<sup>3</sup> *Ante, idem.* *English v. Johnson*, 17 Cal. 107; 12 Mor. Min. Rep. 202. One not in possession cannot maintain a suit to quiet title to a claim upon the public land. *Nevada Min. & Co. v. Kidd*, 37 Cal. 283. A placer claimant in possession of his claim upon the public mining land of the United States can maintain an action to quiet title, although he has not paid his purchase money or obtained patent. *Gillis v. Downey*, 85 Fed. Rep. 483; citing and distinguishing *Frost v. Spitley*, 121 U. S. 552; L. Ed. 1010.

<sup>4</sup> *Head v. Fordyce*, 17 Cal. 149; 12 Mor. Min. Rep. 470; *Goldsmith v. Gilliland*, 22 Fed. Rep. 758; *Milligan v. Laveny*, 9 Pac. Rep. 894.

<sup>5</sup> *Falmouth v. Innis*, Mosley, 87.

<sup>6</sup> *Nevada Co. v. Kidd*, 37 Cal. 283. A right to the continuous flow of

§ 647. **What petition should contain.** — The necessary averments of the petition, in a suit to quiet title, would depend largely upon the code, or statute of the State where the suit is filed. Generally, however, the title or claim of the plaintiff;<sup>1</sup> an averment as to possession;<sup>2</sup> a description of the property;<sup>3</sup> an allegation as to defendant's claim;<sup>4</sup> the facts showing the cloud;<sup>5</sup> the inadequacy of a legal remedy<sup>6</sup> and the prayer for relief,<sup>7</sup> are the essential facts to be alleged in the petition.<sup>8</sup> A general allegation of ownership, however, is sufficient without setting up the facts showing the derivation or source of the title;<sup>9</sup> an allegation of vacancy will excuse an allegation of possession;<sup>10</sup> a description would be sufficient which would identify the property;<sup>11</sup> it is not necessary to set up the nature, extent and circumstances of defendant's claim,<sup>12</sup> and facts showing the apparent validity of the instrument sought to be canceled as a cloud, or which formed

water, being a real property right, is the subject of a suit to quiet title. *Fudicker v. East Riverside Irr. Dist.*, 109 Cal. 29; 41 Pac. Rep. 1024.

<sup>1</sup> *Stratton v. Cal. Land &c. Co.*, 86 Cal. 353; *Rogers v. Miller*, 13 Wash. 82.

<sup>2</sup> *Grove v. Jennings*, 46 Kan. 366; *Wetherell v. Eberle*, 123 Ill. 666.

<sup>3</sup> *Bulwer Con. Min. Co. v. Standard Co.*, 83 Cal. 589; *Goldsmith v. Gilliland*, 10 Law (N. S.), 606.

<sup>4</sup> *Goldsmith v. Gilliland supra*; *Zumwalt v. Madden*, 23 Oregon, 185.

<sup>5</sup> *Gage v. Kaufman*, 133 U. S. 471; *Peacock v. State*, 104 N. Car. 154.

<sup>6</sup> *South Pac. Co. v. Goodrich*, 57 Fed. Rep. 882; *Astiazaron v. Santo Rita Co. (Ariz.)*, 20 Pac. Rep. 189.

<sup>7</sup> *Lees v. Wetmore*, 58 Iowa, 170; *Kennedy v. Elliott*, 85 Fed. Rep. 834.

<sup>8</sup> 17 Enc. Pl. & Pr. 326 to 345.

<sup>9</sup> *Parley's Park Sil. Min. Co. v. Kerr*, 130 U. S. 256; *Ely v. W. M. &c. Co.*, 129 U. S. 221.

<sup>10</sup> *Glos v. Randolph*, 133 Ill. 197; *Muller v. Nieman*, 27 Ark. 234.

<sup>11</sup> *Miller v. Lucco*, 80 Cal. 257. And would be waived by failure to object. *Smith v. Prall*, 133 Ill. 308.

<sup>12</sup> *Scorplon Sil. Min. Co. v. Morsano*, 10 Nev. 370; 13 Mor. Min. Rep. 502.

the basis of the adverse claim,<sup>1</sup> would generally be held sufficient to constitute a good cause of action, together with the other necessary allegations.

§ 648. **Evidence and burden of proof.** — The facts of title, possession, the adverse claim, etc., alleged by the plaintiff, should be proven at the trial, substantially as alleged,<sup>2</sup> and where the answer of the defendant does not amount to a confession of the facts alleged in the petition, the burden of proving such facts is upon the plaintiff.<sup>3</sup> But if, from the nature of the pleadings, the defendant assumes the burden of proof, or asks for affirmative relief, then the burden of proof would be assumed by him and he would be required to establish, by competent evidence, the validity of his claim or title;<sup>4</sup> and in adverse claims, upon the public mining land of the United States, in some jurisdictions, the defendant is always required to prove the validity of his claim, or is held to be the initial

<sup>1</sup> *Teal v. Collins*, 9 Oregon, 89; *Goldsmith v. Gilliland*, 10 Saw. (U. S.) 606; 17 Enc. Pl. & Pr. 341.

<sup>2</sup> *Glas v. Goodrich*, 175 Ill. 20; 51 N. E. Rep. 643; *Winter v. McMillan*, 87 Cal. 256.

<sup>3</sup> The failure to do the necessary work to hold a claim upon the public land of the U. S. is on the party to establish who alleges such failure. *Strasburger v. Beecher*, 20 Mont. 143; 49 Pac. Rep. 740. "Where both plaintiff and defendant, in a suit to quiet title to a mining claim, ask to have their titles quieted, each have the burden of showing the validity of his location; plaintiff to take the lead in such proof." *Shattuck v. Costello* (Ariz.), 68 Pac. Rep. 529 (1902).

<sup>4</sup> *Hungarian Hill Gravel Min. Co. v. Moses*, 58 Cal. 168; *Periga v. Dodge*, 9 Utah, 8; *Bushnell v. Crooke Min. Co.*, 12 Colo. 247; *Winter v. McMillan*, 87 Cal. 257; *Parley Park Silver Min. Co. v. Kerr*, 130 U. S. 256. "The crossbill cannot be maintained after dismissal of the original bill, cross-complainants being out of possession, and having a remedy at law." *Mayer v. Calera Land Co.*, 31 So. Rep. 938 (Ala. 1902). "A crossbill does not lie to quiet a title distinct from complainant's claim." *Idem*.

actor in the proceeding,<sup>1</sup> although this is denied in many States.<sup>2</sup>

§ 649. **Laches and estoppel as effecting.** — In suits to quiet title, as in other equitable proceedings, in regard to mines or minerals, on account of the peculiar nature of the property and its susceptibility to sudden fluctuations, as to value, a party should be vigilant in the assertion of his rights.<sup>3</sup> The granting or withholding of relief is largely a matter within the sound discretion of the chancellor,<sup>4</sup> and where the plaintiff has, by his conduct, induced the defendant to purchase an outstanding title or go to expense to perfect his title, he would generally be refused relief in a suit to quiet title.<sup>5</sup> And although plaintiff may not have actively, by his overt acts, induced the defendant to make expenditures, relying upon the fact that he had a title, if the plaintiff, with mere knowledge of the defendant's claim, permits him, for a great length of time, to remain in possession and claim the property, he will not be permitted, after the defendant has made valuable discoveries of mineral and the property has greatly appreciated

<sup>1</sup> *Scorpion Sil. Min. Co. v. Morsano*, 10 Nev. 370; 12 Mor. Min. Rep. 502; *Golden Fleece Min. Co. v. Con. Gold Min. Co.*, 12 Nev. 320; *Stuart v. Lowry*, 49 Minn. 91. But see, generally, as to burden of proof, 17 Enc. Pl. & Pr. 350; *Toland v. Toland*, 123 Cal. 140.

<sup>2</sup> *Adams v. Crawford*, 116 Cal. 495; *Pierce v. Thompson*, 26 Kan. 714; *Dyer v. Baumeister*, 87 Mo. 137; *Sklawer v. Abbott*, 19 Mont. 228; 17 Enc. Pl. & Pr. 351. As to estoppel of defendant to deny the regularity of proceedings, by course assumed in litigation, see *Johnson v. Minnerica Gold Min. Co.*, 128 Cal. 521; 61 Pac. Rep. 76. Where the defendant's pleading admits the possession of the plaintiff of the mining claim for certain years, he is afterwards estopped to deny that he had performed the assessment work necessary for these years. *Wright v. Killian*, 132 Cal. 56; 64 Pac. Rep. 98.

<sup>3</sup> *Four Mile Land & Coal Co. v. Gibson (Ky.)*, 49 S. W. Rep. 954.

<sup>4</sup> *Stewart's App.*, 78 Pa. St. 88; 12 Mor. Min. Rep. 491.

<sup>5</sup> *Maine Boys Tunnell Co. v. Boston Co.*, 37 Cal. 41; 12 M. M. R. 247.

in value, to then come forward and assert the title.<sup>1</sup> But since knowledge of one's rights is one of the essential elements of an estoppel, no one could be deprived of a right to maintain a suit to remove a cloud until notice of the adverse claim or title was brought home to the plaintiff,<sup>2</sup> and unless there was then some active conduct on his part that would make the subsequent assertion of his title inequitable, it is doubtful if any mere lapse of time short of the period of the statute of limitations should be held to defeat his remedy.<sup>3</sup>

<sup>1</sup> *Four Mile Land & Coal Co. v. Gibson* (Ky.), 49 S. W. Rep. 954. "Where, for years, defendant and those under whom he claims have been in adverse possession of the land, and it appears that plaintiff's claim is due to sudden appreciation in the value of the property, because of discovery of ore, a suit will not lie to remove a cloud." *Four Mile Land & Coal Co. v. Gibson* (Ky.), 49 S. W. Rep. 954. "The defense of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property." *Ernest v. Vivian*, 88 L. J. Ch. 518; M. M. D. 160.

<sup>2</sup> *Schenck v. Wicks* (Utah, 1902), 65 Pac. Rep. 732.

<sup>3</sup> *O'Neill v. Wilcox* (Iowa, 1901), 87 N. W. Rep. 742. "Where land has remained wild until shortly before the commencement of suit for its possession, plaintiff's claim is not stale, for until there was an interference with the possession no necessity arose for resorting to legal remedies." *Penrose v. Doherty*, 67 S. W. Rep. 398 (Ark. 1902).

## CHAPTER XVI.

### RESCISSION OF MINING CONTRACTS.

**SECTION 650.** The subject generally.

- 651. Discretionary — Not absolute right.
- 652. Contract upheld or disaffirmed in entirety.
- 653. Parties placed in statu quo.
- 654. Same — Contract for mining stock.
- 655. Sales of mineral — Inferior quality.
- 656. Fraudulent sales of mines and mining land.
- 657. Same — Evidence of fraud — Statements of value.
- 658. Violation of confidential relation.
- 659. When mistake will justify rescission.
- 660. Delay bars recovery.

§ 650. **The subject generally.** — The general subject of rescission of contracts, like many of the other remedies, treated of specifically in the second part of this work, can be found by the practitioner and more thoroughly examined in any good text-book upon the subject, or in many of the works upon pleading, or equity pleading, and no doubt many references to mining cases can also be found in such general treatises. For this reason a general discussion of the subject will not be attempted here, but only a brief reference to such general principles and such an application of those doctrines as the reports of mining decisions have disclosed are of the most practical importance to practitioners in this special branch of the law.

§ 651. **Discretionary — Not absolute right.** — The equitable remedy of rescission, like that of specific performance and many other remedies administered by a court of chancery, is not recognized in every case as a matter of absolute right, but the granting or refusal of a decree in a given case rests in the sound discretion of the court, to be

exercised according to the equities of each case, in the light of all the facts and circumstances in evidence.<sup>1</sup> As a general rule the jurisdiction of the court should be carefully and sparingly exercised, for where the parties to a contract have reduced their understanding to writing and regularly executed the same, such agreement should not be canceled by the court, except in a very clear case.<sup>2</sup>

§ 652. **Contract upheld or disaffirmed in entirety.** — A party to a contract cannot retain the benefit of the agreement in so far as it may be to his interest to do so and disaffirm it in its onerous conditions, but must rescind or uphold the contract in its entirety.<sup>3</sup> The rule is the same in regard to both real and personal property and the injured party must elect to rescind the contract *in toto* and return everything of value he has received by virtue of the agreement, or retain the property and sue in damages for the injury, since there can be no partial rescission or affirmation, but the entire transaction must be negated or affirmed as a whole.<sup>4</sup>

§ 653. **Parties placed in statu quo.** — As a general rule the rescission of the contract must be complete, before the institution of the action, and if the plaintiff has received anything of value, he must make restitution, as a condition precedent to his right to seek a cancellation of

<sup>1</sup> *Hamilton v. Thompson*, 14 M. M. R. 696. As to necessary averments of bill see *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296.

<sup>2</sup> *Stewart's App.*, 11 M. M. R. 491. Rescission is the converse of specific performance. In the one case the contract is terminated, while in the other it is perfected. 18 Enc. Pl. & Pr. 749. "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity." *Atlantic Delaine Co. v. James*, 94 U. S. 207.

<sup>3</sup> *Byard v. Holmes*, 6 M. M. R. 599; 38 N. J. Law, 119.

<sup>4</sup> *Grant v. Law*, 3 M. M. R. 81; *Nolle v. Virginia Midland Co.*, 88 Va. 948.

the contract by the court.<sup>1</sup> The court would be slow to rescind the contract, unless the parties could be placed in *statu quo*, and where this was impossible, would only grant relief in a case where the equities of the parties would imperatively demand it.<sup>2</sup> But as the law does not require the doing of useless things, no tender back would be required, where the consideration received by the plaintiff was entirely worthless and without value,<sup>3</sup> or, even if the property received by the plaintiff had some value, no tender or offer to return it would be required, if, at the time, the plaintiff had a valid off-set against the defendant, in an amount equal to, or in excess of the value of such property.<sup>4</sup>

§ 654. **Same — Contract for mining stock.** — In a suit for the rescission of a contract for the sale of mining stock, because of fraud practiced upon the plaintiff, in the sale of such stock to him, his petition should usually allege a rescission or tender of the stock or that the property received by him was without value.<sup>5</sup> But where the stock had been deposited by the seller in a bank for the plaintiff, the latter would not be required to redeliver or tender the certificates to the vendor before filing suit.<sup>6</sup> And while the purchaser could not rescind, after a sale of such stock by him,<sup>7</sup> the fact that he had sold a portion of the stock

<sup>1</sup> Byard v. Holmes, 6 M. M. R. 599; 33 N. J. L. 119.

<sup>2</sup> Grymes v. Sanders, 10 M. M. R. 445; Watson Coal Co. v. Casteel, 68 Ind. 476.

<sup>3</sup> Mining stock without value need not be tendered back. Gifford v. Carville, 6 M. M. R. 558; 29 Cal. 589.

<sup>4</sup> Watts v. White, 13 M. M. R. 11; 13 Cal. 321; Thockroth v. Haas, 119 U. S. 499.

<sup>5</sup> Gifford v. Corville, 6 M. M. R. 558; 29 Cal. 589.

<sup>6</sup> Pence v. Langdon, 13 M. M. R. 32; 99 U. S. 578; McCabe v. Burns, 6 M. M. R. 665.

<sup>7</sup> Maturn v. Fredimick, 13 M. M. R. 15.



received, would not prevent a rescission as to that remaining unsold.<sup>1</sup>

§ 655. **Sales of mineral — Inferior quality.** — So generally is the rule recognized that the plaintiff must first return or offer to return the property or subject-matter of the agreement sought to be canceled before suing for a rescission, that in an attempt to rescind an agreement for the sale of a given quantity of mineral, because an inferior quality to that specified in the contract had been delivered, on one or more occasions, a rescission of the agreement will be refused the plaintiff, where some of the mineral had been received and disposed of by him, even though he was ignorant of the quality of the mineral at the time of selling it.<sup>2</sup> Since he could not place the seller in *statu quo*, the purchaser, in such case, would not be in a position to rescind the contract, but would be confined to an action for damages, where the purchase price for the mineral had been paid, or his remedy of set-off, where it had not been paid.<sup>3</sup>

§ 656. **Fraudulent sales of mines and mining land.** — A defrauded vendee of a mine or mining land, like any other defrauded purchaser, can either rescind the sale and conveyance on account of the fraud practiced upon him, or retain the property and sue for damages for his resulting injury.<sup>4</sup> He must promptly exercise his election of reme-

<sup>1</sup> *Idem*, *ante*. Sales of worthless stock will be rescinded. *Ormsby v. Budd*, 83 N. W. 457; *Mor. Min. Rts.* (10 Ed.) 233.

<sup>2</sup> *Scott v. Kittaning Company*, 8 M. M. R. 159.

<sup>3</sup> *Ante*, *idem*. Consideration cannot be recovered, until complete rescission is made. *Getty v. Devlin*, 7 M. M. R. 29. As to right to rescind, after report of expert upon the quality of the mineral sold, see *Perkins v. Rice*, 13 M. M. R. 8.

<sup>4</sup> *Bayard v. Holmes*, 6 M. M. R. 598; *Smith v. Bolles*, 16 M. M. R. 159; *Mor. Min. Rts.* (10 Ed.) 233.

dies, however, for he could not retain the property and also recover the purchase price.<sup>1</sup> The deed, or conveyance, should not only be returned, or tendered, but the entire contract rescinded, where its cancellation is sought,<sup>2</sup> and if the vendee enters into possession and assumes control and ownership of the property, he will be estopped from subsequently contending that it was not his property, and would be held to have lost his right to a rescission of the sale.<sup>3</sup> But an entry into possession would not deprive the defrauded vendee of his right to rescind, if, in addition to the fraud, there was a failure of title, on the part of the vendor,<sup>4</sup> for in any case where a good title cannot be made, or the purchase price paid by the vendee, if such title or payment is a condition precedent to the full performance of the contract, a rescission could be had by either the vendee<sup>5</sup> or the vendor.<sup>6</sup>

<sup>1</sup> *Getty v. Devlin*, 7 M. M. R. 29.

<sup>2</sup> *Ahrens v. Adler*, 12 M. M. R. 114. But papers that passed no title need not be tendered. *Reddington v. Henry*, 3 M. M. R. 32.

<sup>3</sup> *Butler v. Rockwell*, 14 Colo. 126. A vendee entering into an iron mining partnership, does not waive his right to a good title, by acting as a partner, and may rescind for a failure of title. *Stevens v. Guppy*, 13 M. M. R. 315; 3 Ross Ch. 171; *Noyes v. Johnson*, 139 Mass. 436. Fraud will entitle an injured party to set aside a contract of sale or purchase, or a contract for a lease of a mine or quarry. *MacSwinney Mines*, p. 199. *Phosphate Sewage Co. v. Hartmort*, 5 Ch. D. 394; *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218.

<sup>4</sup> *Stevens v. Guppy*, 13 M. M. R. 315.

<sup>5</sup> *Stevens v. Guppy*, *supra*.

<sup>6</sup> *Hammill v. Thompson*, 14 M. M. R. 696. As to when reconveyance is not necessary, see *McCabe v. Burns*, 6 M. M. R. 665. But where the land has risen rapidly in value since the execution of the deed, the court would be slow to grant the vendor a rescission of the contract. *White v. Johnson*, 4 Wash. 113. The following are some of the many cases where rescission of agreements in regard to mining property were canceled for the fraud of one or the other of the parties to the contract: *Barnard v. Roane Iron Co.*, 85 Tenn. 139; *Shute v. Johnson*, 25 Oregon, 59; *Adams v. Reed*, 11 Utah, 480; *Brown v. Rice*, 26 Gratt. (Va.) 467;

§ 657. **Same — Evidence of fraud — Statements of value.** — Any misrepresentation of a material fact in the sale of a mine or of mineral land, by which a party has been misled, to his injury, will constitute sufficient evidence of fraud to justify a timely rescission of the contract, by the injured party. Assertions and opinions as to the value of a mine are generally held not to constitute a fraudulent misrepresentation;<sup>1</sup> but proof of the falsity of a fact, as distinguished from a mere matter of opinion,<sup>2</sup> as statements that certain land contains mineral deposits,<sup>3</sup> found to be false, is *prima facie* evidence of an intent to deceive, and will generally be held to constitute a fraud sufficient to justify a rescission,<sup>4</sup> for in such case the fraud consists in the assertion of a fact not known to exist, which the party making the assertion must know he did not know.<sup>5</sup>

*Hexter v. Bost*, 125 Pa. St. 52; *New Orleans &c. Coal Co. v. Musgrove*, 90 Ala. 429; *Joseph v. Decatur Co.*, 102 Ala. 346; *Hick v. Thomas*, 90 Cal. 289; *Sears v. Hicklin*, 13 Colo. 143; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Maloy v. Berkin*, 11 Mont. 138; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.), 391; *Schroeder v. Young*, 161 U. S. 334. Where a vendor seeks the rescission of a deed obtained by fraud, it is no answer that he had no title, for should he subsequently acquire any it would inure to the grantee, and in any event he would be entitled to have the covenants of the deed canceled. *Jackson v. Toledo*, 3 Wash. 456.

<sup>1</sup> *Chatham Co. v. Moffatt*, 16 M. M. R. 103; 147 Mass. 403; 18 N. E. Rep. 168; 9 Amer. St. Rep. 727; *Reese River M. Co. v. Smith*, L. R., 4 H. L. 79; *Bower v. Fenn*, 90 Pa. St. 359; *Shute v. Johnson*, 25 Oregon, 59.

<sup>2</sup> *Sears v. Hicklin*, 13 Colo. 143; *Lohag v. Bank*, 15 Colo. 339; *Chatham Furnace Co. v. Moffatt*, *supra*.

<sup>3</sup> *Chatham Furnace Co. v. Moffatt*, *supra*.

<sup>4</sup> *Lehigh Co. v. Bamford*, 150 U. S. 665; *Reese River Co. v. Smith*, *supra*.

<sup>5</sup> *Lehigh Co. v. Bamford*, 150 U. S. 665; *Sellor v. Clelland*, 2 Colo. 532; *Chatham Co. v. Moffatt*, *supra*. As to statements as to ore in sight, see *Southern Development Co. v. Silva*, 125 U. S. 247; 15 M. M. R. 435; *Rendell v. Scott*, 70 Cal. 514. To entitle a party to rescission because of fraud or mistake, he must have exercised reasonable diligence to ascer-

So evidence that defendant had "salted" the same mine on other parties, is competent, upon the issue of fraud;<sup>1</sup> assertions of extensive deposits of mineral and mining developments;<sup>2</sup> evidence of promises never intended to be carried out,<sup>3</sup> and false statements of the quantity or quality of mineral in a given tract,<sup>4</sup> are all facts upon which the allegation of fraud could be based. But while a party is held bound for assertions which he assumes to know,<sup>5</sup> he cannot ordinarily be held guilty of a fraud for statements of mere matters of opinion,<sup>6</sup> and the false representations of an agent will not generally be binding upon his principal, unless authorized, or ratified, or made while acting within the general scope of his agency.<sup>7</sup>

§ 658. **Violation of confidential relation.** — Where there is a confidential relation existing between two or more parties and by virtue of such relation, one or more of such parties procures the property or money of another at a sacrifice, a court will cancel the agreement at the instance of the injured person.<sup>8</sup> This rule is particularly applicable to mining property, where the large value of the property is beneath the surface and hidden from ordinary observa-

tain the facts. If he blindly trusts another or neglects to look at the facts, he cannot recover. *Hunt v. Hardwick*, 68 Ga. 100; *Short v. Peirce*, 11 Utah, 29.

<sup>1</sup> *Mudsill Co. v. Watrous*, 61 Fed. Rep. 163.

<sup>2</sup> *Rorer Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285; *Mor. Min. Rts.* (10 Ed.) 233.

<sup>3</sup> *Lawrence v. Gayetty*, 78 Cal. 126.

<sup>4</sup> *Chatham Co. v. Moffatt*, 147 Mass. 403; 16 M. M. R. 103.

<sup>5</sup> *Lehigh Co. v. Bamford*, 150 U. S. 665; *Mor. Min. Rts.* (10 Ed.) 233.

<sup>6</sup> *Chatham Co. v. Moffatt*, *supra*.

<sup>7</sup> *Watson Co. v. James*, 33 N. W. Rep. 622.

<sup>8</sup> *Aloniz v. Cosenave*, 91 Cal. 41; *Brisson v. Brisson*, 90 Cal. 323; *Muzzy v. Tompkinson*, 3 Wash. 616; *Dickinson v. Dickinson*, 24 Neb. 580; 18 Enc. Pl. & Pr. 764.

tion; and where one occupying such relation, with knowledge of such mineral deposits, obtains from an owner, ignorant thereof, an advantageous contract, equity will relieve such owner from the terms of his bargain.<sup>1</sup> Where there is a confidential relation, an infant<sup>2</sup> or lunatic,<sup>3</sup> as the especial wards of a court of equity, will be promptly granted relief from a contract entered into to their disadvantage, and if there are other circumstances of imposition, coupled with the incapacity of the parties, the right to relief would be all the plainer.<sup>4</sup> But mere threats to exercise one's legal rights will not relieve one from a contract made in pursuance thereof,<sup>5</sup> and where an infant on arriving at majority disaffirms a sale, but retains the purchase money, the other party is entitled to a complete rescission of the contract and a recovery of the price paid for the infant's property.<sup>6</sup>

<sup>1</sup> Perhaps the leading case upon this subject is that of *Tate v. Williamson* (L. R. 2 Ch. 61), per Lord Chelmsford, where the plaintiff, a young man, largely in debt, wrote to his uncle about the sale of an interest in a tract of land, of which he had little or no information and the agent of the uncle, the defendant, after getting an expert's opinion as to the value of the mineral deposits in the land, concealed the fact and made the purchase for about a third of such value, but the sale was rescinded by the chancellor and affirmed by the Lord Chief Justice. Nor will assurances by third persons that plaintiff has been "sold" by his friend, prevent relief, where he was constantly assured by such friend that he was not being imposed upon. *Marston v. Simpson*, 54 Cal. 189; 13 M. M. R. 86. But an associate is not to be lightly charged; every presumption is against fraud, and the mere fact that one of two co-owners of a mine buys into an adjoining mine, is not a fraud on the co-owners and no trust will arise, unless trust funds are used in the purchase. *Pierce v. Pierce*, 55 Mich. 675. See, however, as to agent taking position adverse to principal, *Deep River Mining Co. v. Fox*, 1 M. M. R. 296.

<sup>2</sup> *McCarty v. Woodstock Iron Co.*, 92 Ala. 463.

<sup>3</sup> *Thrach v. Starbuck*, 145 Ind. 673; *Maggun v. Pozzoni*, 76 Cal. 631.

<sup>4</sup> Inadequacy of consideration coupled with incapacity from infancy or mental weakness will justify relief. *Moloy v. Berkin*, 11 Mont. 138; *Lester v. Mahan*, 25 Ala. 445; 60 Amer. Dec. 530; *Maddox v. Simmons*, 31 Ga. 512; 18 Enc. Pl. & Pr. 771.

<sup>5</sup> *Morton v. Morris*, 72 Fed. Rep. 392.

<sup>6</sup> *McCarty v. Woodstock Iron Co 2.*, 9 Ala. 463.

§ 659. **When mistake will justify rescission.** — Where one or all of the parties to an agreement has executed it, while acting upon a mistake of fact, material to the contract, a court of equity will rescind the agreement to the same extent as if it had had its origin in fraud or deceit.<sup>1</sup> Where there exists such a mistake, there is no more a meeting of the minds than where the contract is executed upon a false representation of fact, for in either case the party is misled to his disadvantage.<sup>2</sup> In a contract for the sale of a mine or mining land, if there is a material mistake, as to the subject-matter, the agreement will be rescinded;<sup>3</sup> as where the vendee buys land he did not want, through an error in description,<sup>4</sup> or the vendor sells land he did not own, through ignorance and mistake.<sup>5</sup> But to justify a rescission, on the ground of mistake, the matter misconceived should have been the cause of the agreement, or have had an important influence upon it,<sup>6</sup> for unless the mistake was of the essence of the contract, or material to the bargain, it will not authorize a rescission,<sup>7</sup> and the mistake must have been of a fact, as distinguished from a mistake of law. *Ignorantia leges neminem excusat.*<sup>8</sup>

<sup>1</sup> *Werner v. Rawson*, 89 Ga. 619; *Barfield v. Price*, 40 Cal. 535; *Goodrich v. Lathrop*, 94 Cal. 56; *Wilson v. Morris*, 4 Colo. App. 242.

<sup>2</sup> *Griffith v. Sebastian Co.*, 49 Ark. 24; *State v. Paup*, 18 Ark. 129; 56 Amer. Dec. 306; 18 Enc. Pl. & Pr. 761.

<sup>3</sup> *Clapp v. Greenlee*, 100 Iowa, 586; *Hood v. Smith*, 79 Iowa, 621.

<sup>4</sup> *Barfield v. Price*, 40 Cal. 535; *Hearst v. Pujal*, 44 Cal. 280.

<sup>5</sup> *Hitchcock v. Giddings*, 4 Price, 185; *Calverley v. Williams*, 1 Ves. Jr. 210.

<sup>6</sup> *Segur v. Tingley*, 11 Conn. 184.

<sup>7</sup> *Pratt v. Philbrook*, 88 Me. 17; 18 Enc. Pl. & Pr. 762.

<sup>8</sup> *Dill v. Shahan*, 25 Ala. 694; 60 Amer. Dec. 540; 18 Enc. Pl. & Pr. 763. "A party acting as agent for the sale of a gold-bearing tract in Virginia, took the agent of a party who was considering upon the purchase, to the property, where a hurried and superficial examination was made, the agent of the purchasing party being shown a place where gold washing had been conducted, and an abandoned shaft which was

§ 660. **Delay bars recovery.** — Delays are dangerous in all mining transactions, on account of the uncertain and fluctuating value and character of the property. Parties, therefore, desiring to rescind contracts in regard to mineral or mining property, should be especially vigilant in the assertion of their rights.<sup>1</sup> A landowner who has traded his land for shares in a mining corporation, represented to be of a certain value, will be denied relief, although the stock is not worth the amount represented, unless he seeks a disaffirmance of the contract within a reasonable time.<sup>2</sup> But where the delay had not affected the rights of the adverse party, if there had been no appreciation or deterioration of the property in the interim, the relief would not be refused on the ground of the delay alone,<sup>3</sup> and in each case before the court, under all the

supposed to be on a vein included in the tract to be sold. A bargain was at once concluded, and, after examination of title, but without survey, half of the purchase-money was paid. The vendee afterwards discovered that the shaft was not within the lines of the purchase, to which fact the vendor at once assented, but the vendee, upon some prospecting being done, found a vein upon the premises purchased which he declined to explore, and it appeared that as far as examination had gone that the tract was valuable for its gold production, and that no fraud had been practiced, and that all parties were innocent in acting upon the supposition that the shaft originally examined was upon the premises, and that no particular examination of that shaft had been made, and apparently no estimate of value based thereon, and that it had not been treated as a ground of rescission until a considerable period after the mistake had been discovered; it was *held*, no such matter of mistake as to allow of a rescission of the contract by the purchaser." *Grymes v. Sanders*, 93 U. S. 55; M. M. D. 315.

<sup>1</sup> *Jennings v. Broughton*, 12 M. M. R. 405; *Great West. Co. v. Woodman's Co.*, 14 Colo. 90.

<sup>2</sup> *Marston v. Simpson*, 13 M. M. R. 36. Six months is not such laches as to deprive the injured party of relief. *Marston v. Simpson*, *supra*, 54 Cal. 189.

<sup>3</sup> For state of facts allowing rescission after long delay, see *Warner v. Daniels*, 6 M. M. R. 436.

facts and circumstances, the proper allowance should be made and the practical distinction recognized between that rightful caution and preliminary investigation, which characterizes the conduct of every reasonable, thinking man, and the neglect and delay which would be held to constitute laches.<sup>1</sup>

<sup>1</sup> In re Reese River Mining Co., L. R., 2 Ch. App. 604; 13 M. M. R. 19. The parties cannot stand by to await the outcome of their venture, before filing suit for rescission. *Blen v. Bear River Co.*, 8 M. M. R. 435. Five years held to bar a rescission, in Arkansas. *Davis v. Forwater*, 15 Ark. 286. See also In re Russian Iron Works, L. R., 1 Ch. App. Cas. 574. "Petroleum being an article subject to speculation with the varying market price, a rescission of a contract for its delivery must be made within a reasonable time after grounds of rescission arise. Parties cannot take the chance of a rise in the price and elect to deliver or not deliver accordingly; a month's delay in such case upon a series of contracts for monthly deliveries of oil is an unreasonable time." *Morgan v. McKee*, 77 Pa. St. 228; M. M. D. 316.





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